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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-544

In re Applications of

HUGHES-MOORE ASSOCIATES, INC. (hereafter "Hughes")	File No. BPH-870612MC
HERBERT REGENSTREIF (hereafter "Regenstreif")	File No. BPH-870615MI
MIDWAY COMMUNICATIONS, LTD. (hereafter "Midway")	File No. BPH-870615MT
BELHOUSE & ASSOCIATES, INC. (hereafter "Belhouse")	File No. BPH-870615MV

For Construction Permit
for a New FM Station
in Midway, Kentucky
Channel No. 300A (107.9 MHz)

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: December 4, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* On March 3, 1989, Belhouse filed a petition to dismiss the Regenstreif application as inconsistent and in conflict with an application filed by his wife, Charlotte Levy, for a new FM station in Lexington, Kentucky (File No. BPH-880825MJ). By letter dated September 1, 1989, the Chief of the FM Branch dismissed the application of Charlotte Levy as the later-filed of two inconsistent and conflicting applications pursuant to 47 C.F.R. §73.3555(a)(2) and 47 C.F.R. §73.3518. Accordingly, the petition to dismiss will be dismissed as moot.

3. *Other matters.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Regenstreif, Midway and Belhouse have filed such statements, they are deficient. Regenstreif and Midway have not listed a women's organization and Belhouse has not identified a minority organization in response to Section IV of FCC Form 396A (EEO). Accordingly, Regenstreif, Midway and Belhouse will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Hughes petitioned for leave to amend his application on August 29, 1988 and September 19, 1988. Regenstreif petitioned for leave to amend his application on October 7, 1987, December 10, 1987 and October 6, 1988. These accompanying amendments were filed after September 6, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, these amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from these amendments will be disallowed.

5. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petition to dismiss filed by Belhouse IS DISMISSED AS MOOT.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Regenstreif, Midway and Belhouse shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Hughes and Regenstreif ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-502

In re Applications of

THELMA POFF File No. BPH-880114MF
(hereafter "Poff")

JAMES P. GRAY File No. BPH-880114MW
(hereafter "Gray")

For Construction Permit for a New FM Station,
Channel 258A, Ripley, Ohio

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: December 4, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Poff.* On March 18, 1988, the applicant amended the tower sketch in her application to specify a lower tower height due to FAA considerations. However, the applicant inadvertently failed to amend Section V-B, Items 7(a)(2) and 7(a)(3) to specify the new heights. Since this is a good cause amendment filed due to FAA problems, the applicant will be allowed to amend. Accordingly, the applicant is required to amend Section V-B, Items 7(a)(2) and 7(a)(3) of her application within 30 days of the date of this Order to specify the new tower height.

3. *Gray.* A Commission staff study reveals that the calculated distances given in Section V-B, Item 19 for the 60 dbu and 70 dbu contours are in error. Since none of the values violate a Commission rule, the discrepancy can be corrected by an amendment. Accordingly, the applicant is required to amend his application within 30 days of the date of this Order to correct the distances for the 60 dbu and 70 dbu contours given in Section V-B, Item 19 and provide a new map plotting the corrected distances for the 60 dbu.

4. Gray petitioned for leave to amend his application on April 1, 1988(eng.), September 7, 1988, and April 3, 1989. The accompanying amendments were filed after March 28, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. *Other Matters.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Poff shall submit the amendment specified in paragraph 2 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

9. IT IS FURTHER ORDERED, That Gray shall submit the amendment specified in paragraph 3 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Gray ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-503

In re Applications of

SUNBELT BROADCASTERS (hereafter "Sunbelt") File No. BPH-850712G4

SOUTHERN CALIFORNIA BROADCASTING COMPANY (hereafter "Southern") File No. BPH-850712NV

SAN CLEMENTE BROADCASTING CORP. (hereafter "SCBC") File No. BPH-850712SI

STEPHANIE RODRIGUEZ VALLEJOS (hereafter "Vallejos") File No. BPH-850712SM

ON THE BEACH BROADCASTING (hereafter "Beach") File No. BPH-850712UP

JAMES HARDEN AND CLAUDIA HARDEN, A PARTNERSHIP (hereafter "Harden") File No. BPH-850712VI

PORTOLA BROADCASTING CORPORATION (hereafter "Portola") File No. BPH-850712VJ

PAMELA MCCLATCHEY (hereafter "McClatchey") File No. BPH-850711NT (PREVIOUSLY DISMISSED)

MICHAEL J. MILLER D/B/A SAN CLEMENTE FM SERVICES[1] (hereafter "SC Services") File No. BPH-850712SH (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station
on Channel 285A (104.9 MHz)
in San Clemente, California

HEARING DESIGNATION ORDER

Adopted: October 20, 1989; Released: December 4, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[2]

PRELIMINARY MATTERS

2. Pursuant to its *Report and Order* in MM Docket No. 84-442, 50 Fed. Reg. 8226 (1985), the Commission granted Sunbelt's petition to allot Channel 285A to San Clemente, California, specifying a site restriction of 8.9 kilometers (5.5 miles) southeast of the city of license to protect the spacing requirements to FM Stations KDES (Palm Springs, California) and KCBQ (San Diego, California). Although this restriction limited fully-spaced sites to the confines of the United States Marine Corps base at Camp Pendleton, the Commission noted that "the Marine Corps indicated its willingness" to evaluate any civilian proposal to use its property. *Id.*

3. Our records indicate that, of the thirteen applications listed on the Commission's August 15, 1985 *Public Notice* (Report No. 13436) as acceptable for tender, only Harden's proposal to locate its transmitting antenna on the Atchison, Topeka and Santa Fe Railroad's (hereafter "AT&SF") right-of-way 0.3 miles West of San Onofre, California complied with the Commission's minimum separation requirements set forth in 47 C.F.R. § 73.207. Harden certified that reasonable assurance of the availability of this site had been obtained from Mr. J.L. Krupp, AT&SF's Manager of Contracts. While the short-spaced proposals complied with the spacing requirements with respect to KDES and KCBQ, all applicants requested waiver of the Commission's Rules to permit short-spacing between 4.1 and 5.9 kilometers to KKGO, Los Angeles, California, licensed to Mount Wilson FM Broadcasters, Inc.

4. On June 9, 1987, the Commission, reaffirming its "*Trend*" policy, denied the remaining eleven short-spacing waiver requests, emphasizing that it would "not waive the minimum separation requirements when there are mutually exclusive applications for the same channel and, at least, one of the applicants specifies a non-short-spaced site for which no substantial and material question of fact [is] raised regarding [its] technical feasibility or availability." *Letter to Stephanie Rodriguez Vallejos, et al., from Dennis Williams, Chief, FM Branch*, dated June 9, 1987. Since Harden proposed a fully-spaced site and all applications in this proceeding were filed prior to the April 16, 1986 release date of *Donovan Burke*, 104 FCC 2d 843 (1986), the short-spaced applicants were provided a thirty-day period to file a pre-designation amendment to a fully-spaced site.[3]

5. Shortly thereafter, the Department of the Navy and the Marine Corps raised such an availability question. The Navy described the Harden site as situated "in an area which the Atchison, Topeka and Santa Fe Railway Company has an existing right-of-way, but is owned by the United States for Marine Corps Base operations." *Letter to Secretary, FCC, from Frank Fanelli, Manager, Operations Branch, Department of the Navy*, filed June 8, 1987. The Marine Corps informed Harden that the proposed tower would obstruct military helicopter traffic to and from the

base and requested that the applicant "cease making any further representations that state or imply that Marine Corps Base, Camp Pendleton is supportive or amenable to your proposal." *Letter to Mr. James Harden from Lt. Col. G. A. Carlson, USMC, Deputy Assistant Chief of Staff, Facilities*, dated July 21, 1987.[4] This position was conveyed to AT&SF, which subsequently informed Harden of its decision "not to allow installation of a tower on our San Onofre property." *Letter to Mr. James Harden from J. S. Ondeck, Asst. Manager of Contracts, AT&SF*, dated November 24, 1987.[5] Given these determinations, Harden amended its application on February 1, 1988 to specify a site short-spaced to KKGO by 5.9 kilometers.

6. Six months later, the Commission reintroduced a properly spaced proposal into the proceeding when it dismissed Sunbelt's application for review and reinstated its application *nunc pro tunc*. *Letter to Sunbelt Broadcasters from Larry D. Eads, Chief, Audio Services Division*, dated June 15, 1988. Sunbelt proposed to construct its transmitting antenna at a a site 0.3 miles West of San Onofre, and certified that it obtained reasonable assurance of the availability of this site from Mr. William Bentley, the site owner's agent. Sunbelt's application was listed as acceptable for tender on the Commission's June 23, 1988 *Public Notice* and as acceptable for filing on the FCC's *Public Notice* NA-87 (released February 7, 1989).

7. On March 14, 1989, Eric Chandler Communications ("Chandler"), licensee of KCBQ-FM, and Mt. Wilson separately petitioned the Commission to deny the captioned applications.[6] Each had unsuccessfully opposed the allotment of the channel, arguing that there was no available site meeting the minimum separation requirements of 47 C.F.R. § 73.207.[7] In its petition to deny, Chandler claimed standing "as a result of interference to its signal, and the resultant loss of service provided by KCBQ-FM to people in the San Clemente area" (*Chandler Petition*, at footnote 1); Mount Wilson claimed it "would be aggrieved and adversely affected if the waiver requests were granted" by virtue of the acknowledged short-spacings to its facilities" (*Mt. Wilson Petition*, at paragraph 1). In pertinent part, the petitioners alleged that the applicants have not "submitted adequate justification for the waivers which they seek" (*Mt. Wilson Petition*, at page 13) and that "it is clear that Sunbelt will not be able to locate its transmitter at the Santa Fe site for the same reason that the Hardens were forced to amend" (*Chandler Petition*, at footnote 8). Both petitioners requested that the Commission deny the waiver requests and the applications. Oppositions to these pleadings were filed by Sunbelt, Southern, Beach, Harden and Portola on April 6, 1989. Sunbelt distinguished its proposal from Harden's situation, claiming it "is relying on a different parcel of land than that originally proposed by the Hardens" and noting that "unlike the Hardens, Sunbelt has not received a letter from the site's owner withdrawing its permission to use the property as a transmitter site." *Sunbelt Opposition*, at page 3. All argue, in similar language, that the "[p]etitioners have not presented any new facts not already presented in the allocation proceeding and largely repeat arguments already rejected by the Commission." *Portola Opposition*, at paragraph 1. Portola also challenged Chandler's standing, emphasizing that its application is not short-spaced to KCBQ-FM and that Chandler "makes no factual showing whatsoever that any actual interference to its signal would result." *Id.*, at paragraph 2.

8. Section 309(d)(1) of the Communications Act of 1934, as amended, provides that any party may file a petition to deny a broadcast application. Such a petition must contain specific factual allegations sufficient to show that the petitioner is a party in interest. *See NAB Petition for Reconsideration*, 82 FCC 2d 89, 93-94 (1980). In determining whether a petitioner qualifies, a showing is required that it is somehow aggrieved or adversely affected. *Id.*, at 96. When standing is based on anticipated interference from a proposed facility, in circumstances such as those found in the present case, the nature and extent of interference protection accorded commercial FM broadcast stations has, since 1962, been determined solely by the distance separation, power and antenna height limitations set forth in the Commission's rules "without regard to the concept of protected and interfering contours." *Musicast of the South, Inc.*, 45 RR 2d 1213, 1215 (1979), citing *First Report and Order* in Docket No. 14185, 33 FCC 309 (1962). Since the captioned applications, with the exception of Sunbelt, are short-spaced to KKGO but not to KCBQ, only Mt. Wilson may properly claim standing as an aggrieved party. Although Chandler's petition will therefore be treated as an informal objection pursuant to 47 C.F.R. § 73.3587, it will be treated together with Mt. Wilson's pleading in the interest of procedural convenience.

9. As a threshold matter, Section 309(d) also requires that petitions to deny show that a grant of the application would be inconsistent with the public interest, convenience and necessity. *See also Astroline Communications Co. v. FCC*, 857 F. 2d 1556 (D.C. Cir. 1988). In performing this inquiry, the Commission is limited to the petitioners allegations alone and must proceed "on the assumption that the specific facts set forth [in the affidavits] are true." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). If the Commission determines that the petition satisfies the threshold standard of a *prima facie* inconsistency with the public interest, the Commission next determines whether the pleadings (or other matters it may officially notice) raise a substantial and material question of fact. *Astroline*, at 1561. Assuming the validity of their allegations, we conclude that the Chandler and Mt. Wilson pleadings have made a *prima facie* case that Sunbelt's proposal violates the Commission's explicit policy that applicants have reasonable assurance from the property owner that their proposed transmitting antenna sites will be available. *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19940 (1985).

10. According to our analysis of Sunbelt and Harden's tendered proposals, the two fully-spaced sites are approximately 100 feet apart. While this slight difference implies that Sunbelt's site is also within the confines of Camp Pendleton, the petitioners have failed to provide specific facts contradicting Sunbelt's assertion that its site was on a "different parcel of land."[8] Nevertheless, the extremely close proximity of the two sites, in our opinion, raises a substantial and material question of fact that warrants specification of a site availability issue against Sunbelt. When a substantial question is raised in a mutually exclusive context as to the availability of any and all fully-spaced sites, the Commission's established policy is to designate all applications for a comparative hearing with the appropriate issues concerning site availability and the minimum separation requirements. *See, e.g., Clearlake Broadcasting Company*, 47 Fed. Reg. 47931 (1982). Ac-

cordingly, a short-spacing issue will be specified against the other applicants in this proceeding.[9] Chandler and Mt. Wilson will be made parties to the proceeding with respect to the spacing and site availability issues.

SOUTHERN

11. Southern proposes to sidemount its antenna on the existing KWVE (FM) tower. The tower data submitted in Sections V-B and V-G of Southern's application (N.Lat. 33-25-*51*, W.Long. 117-35-47) are inconsistent with those contained in the Commission's records for KWVE (N.Lat. 33-25-*52*, W.Long. 117-35-47). Since Southern's proposal makes specific reference to an existing licensee's tower, the staff could confidently and reliably verify the pertinent tower heights by taking official notice of the tower parameters found in the Commission's records for the licensed facilities. Accordingly, Southern's application was acceptable for filing. However, it will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order, correcting the discrepancy in the coordinates.

VALLEJOS

12. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Vallejos filed such a statement, it is deficient because she did not list any specific sources for the recruitment of minority and female job applicants. Accordingly, Vallejos will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

PETITIONS FOR RECONSIDERATION

13. On January 5, 1989, McClatchey and SC Services' applications were returned as unacceptable for violating the maximum effective radiated power ("ERP") provisions of the United States-Mexican Agreement of November 9, 1972--McClatchey for proposing an ERP of 1.6 kilowatts ("kW"), in excess of the maximum 1.1 kW permitted with an HAAT of 138 meters, and SC Services for proposing an ERP of 0.9 kW, exceeding the maximum permissible 0.6 kW required for an HAAT of 183 meters. Both applicants petitioned for reconsideration of these actions.[10]

14. In their petitions filed February 14, 1989, McClatchey and SC Services seek reconsideration of the Commission's action and base their allegations on procedural and precedential arguments. McClatchey claims that the Commission lacked statutory authority to return her application more than two years after finding it acceptable for tender, and previously designated *and* granted applications exceeding the maximum ERP/HAAT provisions of the U.S.-Mexican Agreement. McClatchey also argues a curative amendment should be allowed in the event the treaty violation is deemed fatal. SC Services' petition alleges that: (i) "nowhere in the rules does one find a statement of what FM requirements pertain under the treaty or, indeed that the treaty imposes any obligations on FM applicants" (*SC Services*, at page 4), and (ii) the Commission's action violated the Court of Appeals mandate in *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985), since the dismissal was made prior to the Commission's December 23, 1985 "full notice of the proscribed conduct" concerning the U.S.-Mexican Agreement.

15. We reject these arguments. While Section 1.108 of the Commission's Rules permits the FCC, in pertinent part, to "set aside any action made or taken by it *within 30 days of the release of the Public Notice announcing that action*" (emphasis added), the Commission did not reverse its finding that McClatchey's application was sufficient for tender pursuant to the detailed criteria in Appendix D of the *Report and Order* in MM Docket 84-750. Instead, McClatchey's application failed to comply with 47 C.F.R. § 73.211, as modified by 47 C.F.R. §§ 73.204 and 73.1650, the Commission's maximum power and height criteria for facilities within 320 kilometers of the U.S.-Mexican border, an essential aspect of the applicant's *technical* qualifications. Applications in violation of the U.S.-Mexican Agreement are subject to return as being unacceptable for filing. *Susan Lundborg*, 3 FCC Rcd 1 (1988). The U.S.-Mexican Agreement has been in effect since 1972, and cannot be waived, altered or canceled unless the nation-parties to the treaty agree to its abrogation or to changes by diplomatic procedure. *Kerrville Radio*, 2 FCC Rcd 3441 (1987). This is not to say that the Commission has not, inadvertently, both designated and granted applications exceeding the U.S.-Mexican Agreement. While McClatchey accurately cites the Commission's inadvertent errors designating an Oro Valley, Arizona application for comparative hearing and granting a Green Valley, Arizona construction permit application in violation of the U.S.-Mexican Agreement, neither case has precedential value. In the former proceeding, the presiding Administrative Law Judge recognized that the application should have been rejected at the processing line and accordingly stipulated that the due diligence standard for determining the acceptance of a curative late-filed amendment would take into consideration "the substantial investments of money and time" peculiar to this case. *Memorandum Opinion and Order* in MM Docket 88-137, FCC 89M-656, Mimeo No.8756 (released February 28, 1989), at paragraphs 4 and 10. In the latter situation, the licensee of the Green Valley, Arizona station was required to reduce its ERP to the level permitted by the U.S.-Mexican Agreement. *Letter to Southwestern Wireless, Inc. from Dennis Williams, Chief, FM Branch*, dated March 22, 1989.

16. Similarly, SC Services' allegations also fail to persuade us. An agency may not, as the petitioner alludes, penalize a private party for violating a rule without first providing adequate notice of the substance of the rule. *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987), citing *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). However, the return of SC Services' application was based not on enforcement of a new rule but rather on compliance with the continuing standards specified in the 1972 U.S.-Mexican Agreement. "Full and explicit notice" of this fact was provided approximately two years *prior* to the filing of SC Services' application, *Report and Order* in BC Docket 80-90, 48 Fed. Reg. 29486, 29499 (1983), and again two months *before* the tendering of its application in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985).[11] The former publication explicitly warned applicants within 320 kilometers of the U.S.-Mexican border that Class A

facilities must conform to the 91-meter (300 feet) maximum HAAT; the latter publication specifically stated, at 19946, that "international agreements also influence permissible ERP levels in border areas" and that "antenna height is also limited in certain cases by international treaty or by allocation constraints." Finally, McClatchey's request for acceptance of a late-filed amendment to cure her defect must be rejected. *Susan Lundborg, supra.* Accordingly, McClatchey's and SC Services' petitions will be denied.

OTHER MATTERS

17. *Environmental.* Two applicants (Harden and Southern) propose to sidemount their transmitting antennas on the existing KWVE (FM) tower; three applicants (SCBC, Beach and Portola) propose to construct new towers near the KWVE (FM) tower. Our engineering study indicates that these proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation, as outlined in OST Bulletin No. 65 (October 1985), in the area immediately surrounding the tower base of the applicants. Consequently, we are concerned that these applicants may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since the proposals of the five listed applicants may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. These studies must consider the cumulative effect of their proposed operations. In this regard, if KWVE's site is presently fenced in compliance with the guidelines, the applicants are required to so state and give the distance from the base of the tower to the fence. Accordingly, Southern, SCBC, Beach, Harden and Portola will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

18. *Late-filed Amendments.* Southern petitioned for leave to amend its application on February 24, 1989. The accompanying amendment was filed after July 25, 1988, the last date for filing minor amendments as of right. Harden, a general partnership, amended its application on February 7, 1989 to correct its response to Section II, Item 10 of FCC Form 301 from "No" to "N/A" since the question pertains only to corporate applicants. Based on its misreading of a January 19, 1989 Commission *Public Notice*, Harden assumed its amendment was filed as of right because the Commission had accepted the application filed by William E. Benns, III (File No. BPH-850710NQ) for tender, thereby creating a new thirty-day period for the filing of amendments as of right. In fact, the *Public Notice* stated that Benns' application was returned as not acceptable for filing on January 5, 1989, having previously been reinstated *nunc pro tunc* as acceptable for tender on the Commission's June 23, 1988 *Public Notice* (Report No. 14201). Since Harden's amendment is corrective in nature, however, it will be accepted with Southern's amendment under Section 1.65 of the Commission's Rules. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

19. *Areas and Populations.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

20. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

21. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposals of Southern, SCBC, Vallejos, Beach, Harden and Portola are consistent with the minimum separation requirements of Section 73.207 of the Commission's Rules and, if not, whether circumstances exist which warrant waiver of the appropriate rule section.

2. To determine whether Sunbelt has reasonable assurance that the transmitter site specified will be available to it.

3. If a final environmental impact statement is issued with respect to Southern, SCBC, Beach, Harden and Portola in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

22. IT IS FURTHER ORDERED, That the informal objection filed by Chandler and the petition to deny filed by Mt. Wilson against the captioned applications ARE GRANTED to the extent indicated and ARE DENIED in all other respects.

23. IT IS FURTHER ORDERED, That Southern must submit an amendment in accordance with paragraph 11 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Vallejos shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

25. IT IS FURTHER ORDERED, That the petitions for reconsideration filed by McClatchey and SC Services ARE DENIED.

26. IT IS FURTHER ORDERED, That in accordance with paragraph 17 hereinabove, Southern, SCBC, Beach, Harden and Portola shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

27. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Southern and Harden ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

28. IT IS FURTHER ORDERED, That Chandler and Mt. Wilson ARE MADE PARTIES TO THIS PROCEEDING with respect to the short-spacing and site availability issues only.

29. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

30. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

31. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] This name reflects the name change noted in the applicant's February 6, 1989 Petition for Reconsideration.

[2] Pursuant to its request of April 7, 1988, the petition for reconsideration filed by Gila Monster Broadcasting, Inc. (File No. BPH-850712X7) was dismissed October 13, 1989. A declaration that no considerations were promised to or received by the applicant, directly or indirectly, was filed by the applicant on April 26, 1988. *See* 47 C.F.R. § 73.3525(c).

[3] Four of the applicants (Lazy D. Enterprises, Inc., Prime Time Broadcasting, Harden and McClatchey) addressed in the June 9, 1987 letter filed various pleadings seeking reconsideration of the Commission's request to amend to a properly spaced site. Of the captioned, surviving applicants, only Portola amended (on July 9, 1987) to a properly-spaced site, *i.e.*, the Harden site. However, prompted by the petition for reconsideration of the San Clemente allocation, Portola withdrew its amendment on July 21, 1987. *Letter to William J. Tricarico, Secretary, FCC from Bruce D. Ryan, Esq.*, dated and filed July 21, 1987. In light of the treatment detailed below in paragraph 10 of this Order, the matters raised in both our June 9, 1987 letter and the applicants' pleadings are now moot.

[4] Enclosed in Harden's application, as amended.

[5] Exhibit A to Harden's January 11, 1988 "Substantial and Significant Change In Information Furnished by James and Claudia Harden to the Commission Pursuant to §1.65."

[6] Pleadings filed prior to the Commission's February 7, 1989 *Notice of Acceptability* are being returned without consideration pursuant to 47 C.F.R. § 73.3584(d). These pleadings include The Audio House, Inc.'s November 27, 1985 "Motion to Dismiss or Return Application as Unacceptable for Filing"; Mt. Wilson's pleadings filed October 8, 1985 ("Petition to Return Applications"), June 12, 1987 ("Motion to Defer Processing of Applications") and January 15, 1988 ("Comments Regarding Harden's 1.65 Filing"); and all associated responsive and supplemental pleadings. Chandler is the successor in interest to The Audio House, Inc.

[7] On September 15, 1989, the U.S. Court of Appeals for the D.C. Circuit dismissed the petitions for review. The Court held that the allotment was not yet ripe for review since the issue of a properly spaced transmitter site for the channel, and the propriety of the allotment itself, could be raised "in a single appeal after the Commission has ruled on the pending license applications." *Mount Wilson FM Broadcasters, Inc., et al. v. FCC*, Case Nos. 87-1289 and 89-1029, slip. op. at pages 11-12 (D.C. Cir. 1989).

[8] Sunbelt (as Sunbelt Television, Inc.) was the petitioner in the Rule Making phase of this proceeding. The site stipulated during this phase was located within Camp Pendleton's boundaries, at coordinates N. Lat. 33 degrees-22 minutes-34 seconds, W. Long. 117 degrees-32 minutes-20 seconds. However, Sunbelt has proposed a site during the application phase located 2.16

miles Northwest of its Rule Making proposal, with coordinates listed at N. Lat. 33 degrees-22 minutes-52 seconds, W. Long. 117 degrees-34 minutes-33 seconds.

[9] Post-designation technical amendments relating to this issue may be filed as a matter of right pursuant to 47 C.F.R. § 73.3522(b). However, applicants are reminded that, if such amendments are filed pursuant to 47 C.F.R. § 73.215, the amendments *must* "specify whether they are to be processed under the new contour protection rules" adopted in the Commission's action permitting short-spaced FM station assignments by using directional antennas. *Report and Order* in MM Docket 87-121, 4 FCC Rcd 1681, 1688 (1989).

[10] Although SC Services requested (on August 29, 1989) that its petition be withdrawn, it has not, to date, provided the declaration required pursuant to 47 C.F.R. § 73.3525(c).

[11] "It is well settled under 44 U.S.C. § 1507 that publication in the *Federal Register* constitutes constructive notice of Commission processing standards." *Susan Lundborg, supra*, citing *Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947). Interested parties are charged, therefore, with knowledge of matters properly published therein. 220 *Television, Inc.*, 81 FCC 2d 575, 577 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHERN NEW ENGLAND
TELEPHONE COMPANY

Petition for Review of Accounting Orders
Imposed in Tariff Investigations

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY

Revisions to Tariff **DOCKET NO. 18128**
F.C.C. No. 260
Private Line Services (TELPAK)

Revisions to Tariff **DOCKET NO. 20736**
F.C.C. No. 260
(Series 1000)

Revisions to Tariff **DOCKET NO. 20814**
F.C.C. Nos. 260,
264, and 266

Revisions to Tariff **CC DOCKET NO. 79-138**
F.C.C. No. 260
Increased Rates Relating to Common
Control Switching Arrangements

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 1989; Released: December 4, 1989

By the Commission:

I. INTRODUCTION

1. This is the third in a series of Orders addressing a petition filed by the Southern New England Telephone Company (SNET). In that petition, filed on August 14, 1987, SNET requests that this Commission review 15 accounting orders to determine whether they should be terminated. These orders are listed in the Appendix to this Order. The first two Orders each terminated three of the accounting orders;[1] this Order addresses six additional accounting orders.

II. BACKGROUND

2. On August 26, 1987, this Commission released a Public Notice inviting comments on SNET's petition.[2] Comments were filed on February 16, 1988, and replies on April 4, 1988.[3] While all the commenters agree with SNET that the accounting orders should be terminated, MCI contends that this Commission should examine each of the underlying investigations before terminating a proceeding. In the *ENFIA Order*, the first Order in this series, we concluded that we should follow that procedure. The *ENFIA Order* terminated the investigations as well as the accounting orders that were entered in those dockets. In addition, the Order summarizes the SNET petition and the comments. *See ENFIA Order*, 5 FCC Rcd at 5500-01. Finally, due to the number and complexity of the accounting orders under review, this Commission determined in the *ENFIA Order* that the optimum method of examining each investigation and accounting order would be to group the proceedings according to four broad categories, as AT&T does in its comments, and to issue a separate Order for each category.[4] *Id.* at 5501. This Order examines the third category of investigations which relate to AT&T's private line tariff offerings. We discuss first the accounting orders associated with TELPAK, followed by a discussion of those associated with other private line offerings.

III. TELPAK ACCOUNTING ORDERS

3. Three of these private line service accounting orders relate to TELPAK, a bulk private line offering previously provided by AT&T. Pursuant to the TELPAK offering, AT&T provided communications paths capable of transmitting various forms of electrical communication such as telephone, teletypewriter, control, signalling, facsimile and data. Four variations were offered, TELPAK A, B, C, and D, which were determined by the number of voice grade channels available in each designation.

4. On March 25, 1968, AT&T filed rate increases for TELPAK C and D. By Order released April 12, 1968, we suspended the tariff revisions for the three-month statutory period and initiated Docket 18128 to investigate the lawfulness, under Sections 201(b) and 202(a) of the Act, 47 U.S.C. §§ 201 (b), 202(a), of each of AT&T's private line categories, except audio and video.[5] At that time, we left open the question of an accounting order. Several months later, we further examined the issues raised in Docket 18128 in the context of petitions seeking consolidation of that proceeding with Docket 16258, a general investigation of AT&T's total interstate and foreign services.[6] While we declined to consolidate Dockets 16258 and 18128 at that time, this Commission imposed an accounting order in Docket 18128 and held the hearings in that docket in abeyance, pending the determination in Docket 16258 of appropriate ratemaking principles.[7]

5. AT&T filed additional TELPAK rate increases in 1969. The proposed filing, titled Series 11,000, was intended to provide, on an experimental basis, high capacity wideband channels on a discrete spectrum basis which could be arranged by AT&T for a variety of wideband uses or for individual voice grade channels. This Commission determined that because its investigation of TELPAK was pending in Docket 18128 and these rate revisions involved substantial increases, we would suspend the tariff schedules, subject to an accounting order.[8] We then included these tariff revisions in our Docket 18128 investigation.[9]

6. On December 6, 1971, AT&T filed further revisions to its TELPAK offering. In our review of these revisions, we concluded that certain issues raised in this tariff filing should be included in the Docket 18128 investigation. We therefore suspended the revisions for the full statutory period. In the event the tariff became effective before the

investigation was completed, we ordered AT&T to keep accounts of all monies received pursuant to these tariff revisions in order to make refunds.[10]

7. In 1976, this Commission concluded our investigation of the issues designated in Docket 18128.[11] The *Final Decision* established general ratemaking principles for all AT&T filings. The *Final Decision* also examined specific TELPAK rates to determine if they could be justified under the competitive necessity test. We concluded that the rates did not meet the standard and were therefore unlawful. Accordingly, AT&T was ordered to cease charging these rates within eight months of the effective date of the Order and to file a replacement tariff.[12] Also, in the *Final Decision*, this Commission terminated all the outstanding accounting orders relating to TELPAK.[13]

8. On reconsideration, this Commission set aside our finding that TELPAK was unlawful and stated our intention to conduct an expedited hearing regarding the lawfulness of the TELPAK rates.[14] Since further hearings would be held regarding TELPAK rates, we also set aside our decision to terminate all the outstanding accounting orders.[15] Then, on further reconsideration, this Commission reinstated the accounting orders pending completion of the further investigations, stating that we had "inadvertently dissolved" the extant accounting orders. As TELPAK rates were subject to further proceedings, this Commission stated that there was a possibility that certain customers were overcharged and thus entitled to refunds.[16]

9. In 1977, we concluded that resale and shared use of TELPAK, as well as other communications services, were necessary to satisfy the requirements of the Communications Act and ordered carriers to publish new tariffs consistent with our Order.[17] AT&T, in particular, was ordered to file tariffs permitting the resale and unlimited sharing of TELPAK. AT&T, however, determined that it would not be economically feasible to offer TELPAK under these conditions and, therefore, on March 23, 1977, terminated its TELPAK offering.[18]

IV. OTHER PRIVATE LINE ACCOUNTING ORDERS

10. There are three other open accounting orders related to private line services. These accounting orders were imposed in Dockets 20736, 20814, and CC 79-138. The first of these orders, in Docket 20736, concerned tariff revisions AT&T filed to modify the rate structure and increase rate levels for Series 1000 service (sub-voice grade private line service).[19] Petitioners opposing the tariff filing claimed that AT&T did not provide adequate cost support data to support its rate increases.[20] This Commission suspended the tariff for one day, instituted an accounting order, and set the matter for investigation. The primary issue designated for investigation was whether the apparent discrepancy between AT&T's cost support material and the charges for its Series 1000 station terminals resulted in any undue discrimination.[21] The investigation which followed found that the Series 1000 station terminal rates were not discriminatory.[22]

11. In 1976, AT&T filed its Series 2000/3000 offering to introduce its Multi-Schedule Private Line (MPL) rate scheme. In addition, AT&T filed its Series 5000 offering to apply the MPL rates to TELPAK single voice grade facilities. A number of petitions to suspend or reject the MPL tariff were filed. The petitioners argued that the MPL plan was unlawfully discriminatory and that critical cost support data had not been filed. Those petitioners also argued that the cost support data which had been filed did not adequately support the tariff because, among other things, AT&T incorrectly relied on fully distributed costs to develop the rates. This Commission suspended that tariff for three months, initiated its Docket 20814 investigation, and imposed an accounting order.[23]

12. At the conclusion of the Docket 20814 investigation, this Commission concluded, among other things, that AT&T's MPL tariff was unjust and unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), and that it violated our Docket 18128 decisions. We found that AT&T's cost support data were unreliable and inadequate to justify the specific MPL tariff rates under investigation. Nevertheless, this Commission allowed the MPL rates to continue in effect pending further Commission action or until cancelled by a subsequent tariff revision.[24]

13. The final private line accounting order at issue in this Order is associated with CC Docket 79-138. The tariff revisions at issue in this docket were intended to raise the earnings level of Common Control Switching Arrangements (CCSA) from 4.44 percent to 9.5 percent, as required by Docket 18128. This rate increase was intended to take place in conjunction with planned shifts from CCSA investment, due to declining interest in CCSA, to other services. Two petitions to suspend or reject the tariff were filed. This Commission permitted the tariff revisions to become effective and initiated the CC Docket 79-138 investigation to address the proposed investment shifts away from CCSA to other services, and the adequacy of AT&T's cost support data.[25] In addition, we imposed an accounting order in the event refunds were later found to be warranted.[26] No further action was taken in the proceeding.

V. AT&T COMMENTS

14. AT&T is the only commenter which discusses the substance of these investigations and its reasons for advocating termination of the accounting orders. AT&T maintains that the TELPAK accounting orders were imposed because the rates were not developed on an FDC basis and the application of the FDC methodology might have shown that some of the rate elements were too high.[27] AT&T contends that the three remaining accounting orders were initiated because of our concern that the rates in question may not have been justifiable under the FDC methodology then being developed in Docket 18128. However, AT&T asserts, since this Commission abandoned that FDC methodology in the Interim Cost Allocation Order (*ICAM Order*),[28] the "sole justification for the accounting orders has been eliminated."[29]

15. Further, according to AT&T, implementation of the ICAM resulted in substantial reallocation of costs from AT&T's switched services to its private line category. This reallocation, AT&T asserts, was evident in Docket 20814. AT&T states that the *Reconsideration Order* in that docket directed AT&T to revise its rates to conform with the ICAM and to produce the prescribed interstate rate of return.[30] According to AT&T, this Commission found such revisions to be in order in light of admissions by AT&T that application of the proposed manual procedures would result in a substantial reallocation of costs to the private line category, necessitating a corresponding

increase in private line rates.[31] AT&T contends that the fact that its private line rates would increase as a result of the application of the ICAM indicated that AT&T's private line rates were not excessive.[32]

16. As for the remaining three accounting orders, AT&T contends that those investigations also are moot because of our discontinuance of the FDC methodology adopted in Docket 18128. According to AT&T, "the Commission's abandonment of the Docket No. 18128 FDC costing methodology has removed the principal predicate for those investigations, and subsequent events have demonstrated that there is no other basis for refunds."[33] Specifically, AT&T states that the issues in CC Docket 79-138 are no longer relevant for this reason.[34] Furthermore, with respect to Docket 20814, AT&T asserts that our investigation indicated that AT&T's Multi-Schedule Private Line rates clearly were not too high.[35] Finally, AT&T contends that with the abandonment of the Docket 18128 FDC methodology, the only issue that remained in Docket 20736 was whether the station terminal rates for the Series 1000 services were discriminatory. According to AT&T, the subsequent investigation in Docket 21417 found that the rates were not discriminatory. Therefore, AT&T concludes that no refunds are warranted in that proceeding.[36]

VI. DISCUSSION

17. From the foregoing history of these various proceedings, it is apparent that the reasons for instituting these six accounting orders have been overtaken by subsequent events, and that no purpose would be served by requiring the carriers to continue to maintain them. For example, the divestiture of the Bell System in 1984 resulted in the replacement of all Bell System tariffs with new tariffs for AT&T and the Bell Operating Companies. AT&T is correct that the tariffs under investigation in Dockets 20736, 20814, and CC 79-138 were replaced by the post-divestiture tariffs. Accordingly, the rates at issue in the three private line investigations are effectively moot since the tariffs thereunder have not been in effect for quite some time. Also moot are any issues arising from the TELPAK investigations, as that service was withdrawn by AT&T in 1977.

18. Moreover, it is clear that no refunds would be owed customers as a result of these private line investigations in any event. This Commission never determined that any TELPAK rates were too high. Instead, our findings in our prior orders in Docket 18128 included a broad determination that AT&T's reliance on long run incremental costing (LRIC) was unfounded and should be replaced with an FDC methodology known as Method 7; we subsequently determined that Method 7 should be replaced by the ICAM.[37] While the court in *ARINC* affirmed this Commission's finding that FDC should have been utilized for ratemaking rather than LRIC, it remanded to us for further proceedings the issue whether the TELPAK rates were just and reasonable.[38] However, no final action was ever taken by this Commission.[39] The Administrative Law Judge (ALJ) in the remand proceeding stated that "[t]here is no need to hold hearings on the refund question since the user parties believe that the existing Docket 18128 record is sufficient to present their claims to the Commission."[40] The ALJ then certified the issue of refunds to this Commission for resolution, but no refunds were ever requested or awarded.[41]

19. Nor are refunds warranted in the other private line investigations. As AT&T correctly notes, while this Commission did determine that the MPL rates under investigation in Docket 20814 were unlawful, this Commission did not find that MPL rates were unreasonably high. In fact, the specific issues designated for hearing were not resolved because this Commission recognized that the tariffs under investigation would be replaced at some later time. Moreover, as AT&T notes, this Commission was concerned with whether the rates were set in a manner consistent with the ratemaking principles developed in Docket 18128, which principles were later superseded. In addition, in Docket 20736 this Commission specifically found that the rates for Series 1000 service were not discriminatory.[42] Furthermore, this Commission determined in Docket 21417 that AT&T's rates for its Series 1000 service produced earnings below AT&T's authorized rate of return.[43] Thus, there is no basis for refunds in either of these investigations.

20. Finally, AT&T is correct that the investigation in CC Docket 79-138 was never completed. However, this Commission determined in our initial review of the proposed rates that the rates did not appear to be excessive and therefore did not designate that issue for investigation. Accordingly, we have no basis upon which to conclude that the rates in question were unreasonably high. When the investigation was initiated, this Commission stated that our "primary concern is with the proposed investment shifts and their compliance with our *Docket 18128* Decision."[44] As AT&T correctly notes, the ratemaking principles adopted in that docket have since been replaced and these concerns are no longer relevant. Therefore, no refunds associated with this proceeding are warranted.

21. For the foregoing reasons, we have decided to terminate the six investigations discussed in this Order and the accounting orders imposed therein. Our action will prevent further unnecessary expenditure of carrier resources to comply with the accounting orders at issue in this phase of this proceeding.

VII. CONCLUSION; ORDERING CLAUSES

22. On the basis of the foregoing discussion, we consider the investigations initiated in the three TELPAK Orders in Docket 18128 and the three other private line proceedings to be moot and therefore terminated by this Order. In addition, any accounting orders imposed in those investigations are likewise terminated.

23. Accordingly, IT IS ORDERED that the petition for review filed by the Southern New England Telephone Company IS GRANTED to the extent indicated herein.

24. IT IS FURTHER ORDERED that the investigation and accounting orders initiated in Docket Nos. 18128, 20736, 20814, and CC 79-138 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

LIST OF OPEN ACCOUNTING ORDERS

ENFIA

AT&T Transmittal Nos. 43 and 45, Mimeo No. 1425, released Jan. 6, 1982 (Com.Car. Bur.).

AT&T Transmittal No. 56, Mimeo No. 5704, released Aug. 10, 1982 (Com. Car. Bur.).

AT&T Transmittal No. 53, 90 FCC 2d 202 (1982).

GENERAL RATE INCREASES

AT&T, Docket No. 20732, 58 FCC 2d 1 (1976).

AT&T, Charges for Interstate Service, Mimeo No. 32427, released June 13, 1980 (Com.Car.Bur.).

AT&T, Transmittal Nos. 13703-13708, et al., 86 FCC 2d 956 (1981).

PRIVATE LINE PROCEEDINGS

AT&T, Docket No. 18128 (TELPAK), 13 FCC 2d 853 (1968).

AT&T, Docket No. 18128 (TELPAK), 20 FCC 2d 383 (1969).

AT&T, Docket No. 18128 (TELPAK), 33 FCC 2d 522 (1972).

AT&T, Docket No. 20736, 58 FCC 2d 899 (1976).

AT&T, Docket No. 20814, 59 FCC 2d 428 (1976).

AT&T, CC Docket No. 79-138, 72 FCC 2d 313 (1979).

WATS AND 800 RATE INVESTIGATIONS

AT&T, Docket No. 19129, 40 FCC 2d 18 (1973).

AT&T, Docket No. 19989, 46 FCC 2d 81 (1974).

AT&T, CC Docket No. 80-765, Phase I, 86 FCC 2d 820 (1981).

FOOTNOTES

[1] SNET Petition for Review of Accounting Orders Imposed in Tariff Investigations, Memorandum Opinion and Order, 5 FCC Rcd 5500 (1989) (*ENFIA Order*); SNET Petition for Review of Accounting Orders Imposed in Tariff Investigations, Memorandum Opinion and Order, FCC 89-294, released Nov. 3, 1989.

[2] Commission Establishes Pleading Cycle for Petitions Concerning Southern New England Telephone Company's Petition for Review of Outstanding Accounting Orders, 2 FCC Rcd 5262 (1987).

[3] The parties filing comments are: the Ameritech Operating Companies, American Telephone and Telegraph Company (AT&T), BellSouth Telephone Companies (BellSouth), Cincinnati Bell Telephone, Contel Corporation, GTE Telephone Companies, MCI Telecommunications Corp. (MCI), Southwestern Bell Telephone Company (SWB), and United States Telephone Association (USTA). Reply comments were filed by BellSouth, MCI, SWB, USTA, Pacific Bell and Nevada Bell, Bell Atlantic Telephone Companies, and SNET. The comments are summarized in the *ENFIA Order*, 5 FCC Rcd at 5500-01.

[4] The four categories as identified by AT&T in its comments are as follows: accounting orders related to Exchange Network Facilities for Interstate Access (ENFIA); accounting orders for across-the-board rate increases filed between 1976 and 1981 for AT&T's switched and private line services; accounting orders associated with the investigation of AT&T's private line tariffs, specifically AT&T's compliance with the Fully Distributed Cost (FDC) methodology in Docket 18128; and accounting orders for AT&T WATS and 800 Service tariffs filed during the 1970s and early 1980s.

[5] AT&T, Docket No. 18128, FCC No. 68-388, released Apr. 12, 1968.

[6] AT&T, Charges for Interstate and Foreign Communication Service, Docket No. 16258, Memorandum Opinion and Order, 6 FCC 2d 177 (1966). The Docket 16258 proceeding was concluded by mutual agreement among the parties. AT&T, Charges for Interstate and Foreign Communication Service, Docket No. 16258, Memorandum Opinion and Order, 18 FCC 2d 761 (1969).

[7] AT&T, Charges for Interstate and Foreign Communication Service, Memorandum Opinion and Order, Docket Nos. 15011, 16258, and 18128, 13 FCC 2d 853, 858-59 (1968).

[8] AT&T, Long Lines Department, Revision of Tariff F.C.C. No. 260, Private Line Services, Series 5000 (TELPAK), Memorandum Opinion and Order, Docket 18128, 20 FCC 2d 383, 387 (1969).

[9] *Id.* at 388.

[10] AT&T, Revisions of Tariff F.C.C. No. 260, Private Line Services, Series 5000, TELPAK, Memorandum Opinion and Order, Docket No. 18128, 33 FCC 2d 522, 525 (1972).

[11] AT&T, Revisions of Tariff F.C.C. No. 260, Private Line Series 5000 (TELPAK), Memorandum Opinion and Order, Docket No. 18128, 61 FCC 2d 587 (1976) (*Final Decision*).

[12] *Id.* at 659.

[13] *Id.* at 668-69.

[14] AT&T, Revisions of Tariff F.C.C. No. 260, Private Line Services, Series 5000 (TELPAK), Docket No. 18128, Memorandum Opinion and Order, 64 FCC 2d 971, 985 (1977).

[15] *Id.* at 983.

[16] Docket No. 18128, Second Order on Reconsideration, 67 FCC 2d 1441, 1452-53 (1978), *aff'd in part and remanded in part*, Aeronautical Radio Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980) (*ARINC*).

[17] *See* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Report and Order, Docket No. 20097, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.*, AT&T v. FCC, 572 F.2d 17 (2d. Cir. 1977), *cert. den.*, 439 U.S. 875 (1978).

[18] Revisions to Tariff F.C.C. Nos. 258 and 260, Series 5000, Termination of TELPAK, Memorandum Opinion and Order, 64 FCC 2d 959 (1977).

[19] AT&T, Revision to Tariff F.C.C. No. 260, Series 1000, Memorandum Opinion and Order, Docket No. 20736, 58 FCC 2d 899 (1976).

[20] *Id.* at 900-01.

[21] *Id.* at 903-04.

[22] AT&T, Revision to Tariff F.C.C. No. 260, Series 1000, Initial Decision, Docket No. 20736, FCC 77D-24, released May 9, 1977. In a related proceeding, Docket 21417, this Commission determined that AT&T was unable to set its Series 1000 rates at a level sufficient to earn the authorized rate of return. AT&T, Revisions to F.C.C. Tariff No. 260, Memorandum Opinion and Order, Docket No. 21417, 66 FCC 2d 489, 490 (1977).

[23] AT&T, Charges for Private Line Services, Revisions of Tariff F.C.C. Nos. 260, 264, and 266, filed in Transmittal No. 12546, Series 2000/3000, Memorandum Opinion and Order, Docket No. 20814, 59 FCC 2d 428, 430-31 (1976).

[24] AT&T, Charges for Private Line Services, Revisions of Tariff F.C.C. Nos. 260, 264, and 266, filed in Transmittal No. 12546, Series 2000/3000, Final Decision, Docket No. 20814, 74 FCC 2d 1, 32-49 (1979), (*Docket No. 20814 Final Decision*), *appeals dismissed sub nom.*, Southern Pacific Communications Co. v. FCC, No. 2212 (D.C. Cir., June 24, 1981).

[25] AT&T, Revisions to Tariff F.C.C. No. 260, Increased Rates Relating to Common Contral Switching Arrangements, Memorandum Opinion and Order, CC Docket No. 78-138, 72 FCC 2d 313, 322-24 (1979). With respect to the investment shifts, we undertook to examine whether such shifts were consistent with the fully distributed cost (FDC) cost allocation methodology adopted in Docket 18128. *Id.*

[26] *Id.*

[27] AT&T Comments at 6.

[28] *See* AT&T, Manual and Procedures for the Allocation of Costs, Report and Order, Docket No. 79-245, 84 FCC 2d 384 (1981)(*ICAM Order*).

[29] AT&T Comments at 7.

[30] *Id.* (citing AT&T, Charges for Private Line Services, Revisions of F.C.C. Tariff No. 260, 264, and 266, Docket No. 20814, Memorandum Opinion and Order, 85 FCC 2d 549, 559 (1981) (*Reconsideration Order*)).

[31] AT&T Comments at 7 (citing *Reconsideration Order*, 85 FCC 2d at 559).

[32] AT&T Comments at 7, 9 n.**.

[33] *Id.* at 9. We note here that the Docket 18128 issue was eliminated from the Docket 20736 proceeding. AT&T, Revision to Tariff F.C.C. No. 260, Series 1000, Docket No. 20736, Order, 59 FCC 2d 163 (1976).

[34] AT&T Comments at 8.

[35] Docket No. 20814, Final Decision, 74 FCC 2d at 42 (1979).

[36] AT&T Comments at 10.

[37] *ICAM Order*, 84 FCC 2d 384 (1981). We recently repealed the ICAM when we decided to revise our methods for regulating AT&T. In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873, 3136-37 (1989).

[38] *ARINC*, 642 F.2d at 1230.

[39] *See* Docket No. 18128, FCC 81M-4001, released Dec. 18, 1981.

[40] *Id.* at para. 6.

[41] The Common Carrer Bureau determined in another proceeding that TELPAK rates were not unreasonably high and that, in fact, TELPAK offered service to the public identical to that available under AT&T's single channel private line service, but at a much lower overall rate. AT&T, Revision of Definition of Service Point in Connection with Private Line Services and Channels, Docket No. 16072, Memorandum Opinion and Order, Mimeo No. 197, released Oct. 26, 1981 (Com.Car.Bur.).

[42] AT&T, Revision to Tariff F.C.C. No. 260, Series 1000, Docket No. 20736, Memorandum Opinion and Order, 58 FCC 2d 899 (1976).

[43] *See* note 22, *supra*.

[44] AT&T, Revisions to Tariff F.C.C. No. 260, Increased Rates Relating to Common Control Switching Arrangements, CC Docket No. 79-138, Memorandum Opinion and Order, 72 FCC 2d 313, 321 (1979).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Revisions to Tariff F.C.C. No. 12

Transmittal Nos. 1810, 1826, and 1832

Custom-Designed Integrated Services

ORDER

Adopted: November 21, 1989; Released: November 22, 1989

By the Chief, Common Carrier Bureau:

1. AT&T Communications (AT&T) Transmittal 1810, filed September 29 and scheduled to become effective November 26, 1989, would establish an integrated service package, Virtual Telecommunications Network Service (VTNS) Option 17, to be provided under AT&T Tariff F.C.C. No. 12. Petitions to reject or suspend VTNS Option 17 were filed October 16, 1989, by MCI Telecommunications Corporation (MCI), US Sprint Communications Company Limited Partnership (Sprint), and Williams Telecommunications Group, Inc. (Williams).[1] AT&T filed its reply October 26, 1989.

2. On October 12, 1989, AT&T filed Transmittal 1826, to provide VTNS Option 18, and on October 13 filed Transmittal 1832, to provide VTNS Option 19. These options are also scheduled to become effective November 26, 1989. They are opposed by Sprint and Williams in joint petitions filed on October 27 and by MCI in separate petitions filed on October 27 and October 30, 1989. AT&T replied to these petitions on November 6, 1989.

3. VTNS Option 17 would be initially configured with 786 Measured Remote Ports, 224 Data Transmission Capabilities (DTCs) of various speeds, and 30 Voice Transmission Capabilities (VTCs). The port and DTC quantities may not be decreased below 60 percent of these levels without prior agreement. The basic monthly charge for these facilities is $372,000, subject to change charges for incremental facilities. Measured charges are governed by three rate schedules, each sensitive to mileage and time-of-day elements and, as well, to a graduated volume discount. A second, staged volume discount provision is applicable to monthly charges associated with the network's total number of VTC and DTC components.

4. VTNS Option 18 offers a network serving specific international locations as well as United States mainland and island locations. The basic charge for this option is $136,600 for the first three months and $156,600 for succeeding months of the five-year term, subject to change charges for incremental facilities. This charge covers 267 Measured Remote Ports, 422 Measured Ports, and 122 DTCs of varied speeds. The total number of ports may not be decreased below 552, nor the total of DTCs below 116, without prior agreement between the carrier and customer. Measured charges for domestic calls are governed by three rate schedules which are sensitive to mileage and time-of-day elements, as well as a graduated volume pricing plan; measured charges for calls to specified foreign locations, to Canada, and to Mexico, respectively, are governed by an additional three rate schedules and an international volume pricing plan. A third volume pricing plan is applied to the monthly charges associated with the customer's total DTC facilities.

5. VTNS Option 19 also provides a network serving specific international locations in addition to United States mainland and island locations. The basic charge for VTNS Option 19 is $131,419 per month for the first three months' service and $182,500 per month for the remainder of the three-year term, subject to incremental change charges. The basic charge covers 194 Measured Remote Ports, and 60 domestic and 8 international DTCs of various speeds, subject to detailed limits on facility reductions. Measured charges for domestic calls, are governed by three rate schedules sensitive to mileage and time-of-day. A fourth rate schedule governs calls to specified foreign locations, and two others set rates for calls to Canada and Mexico. International calls are subject to a volume pricing plan, and the customer's monthly charges for domestic DTCs qualify for staged volume discounts. The measured charge schedules for domestic calls are not further discounted for volume, however.

6. MCI states in its three petitions that matters between AT&T and its Tariff 12 customers relating to other than tariffed transmission fall within the Commission's jurisdictional concern, and urges the Commission to review contracts between AT&T and its VTNS customers to determine the "full nature and scope" of the relationship. MCI Petition (Option 17) at 4-6; MCI Petition (Option 18) at 5-7; MCI Petition (Option 19) at 5-7. MCI contends that such underlying and associated contracts conflict with Section 203 of the Communications Act, 47 U.S.C. § 203, and that Commission acquiescence in what it refers to as "one-on-one" transactions between AT&T and individual customers conflicts with the Commission's concern over "individual case basis" (ICB) pricing of transactions between local exchange carriers and their customers for DS-3 services. *Id* at 6-7; *id*. at 7-8; *id*. at 7-8.

7. Sprint asserts that AT&T has failed to demonstrate that these VTNS options are consistent with -- *i.e.*, "like" -- the integrated service packages (ISPs) under review in the Commission's *April 18 Order*,[2] or alternatively to justify the difference in rates and other conditions among the several options and AT&T's component services. Thus, Sprint contends, AT&T should be required to prepare an integrated VTNS offering. Sprint Petition (Option 17) at 2-4; Sprint Petition (Options 18-19) at 2-5. Sprint also states that the specification of facilities and charges for these options unreasonably restricts them to an individual customer. *Id*. at 4-6; *id*. at 6-8. Sprint also asserts that deficient cost support information and inconsistent expenses, when compared to earlier VTNS options, render the AT&T proposals unlawful. *Id*. at 7-13; *id*. at 8-11.

8. Williams states that the specific provisions contained in these options make them practically available to only one customer, conflicting with the *April 18 Order* and other Commission decisions. Williams Petition (Option 17) at 5-13; Williams Petition (Options 18-19) at 6-14. Williams adds that the cost justification for these options is based on unsupported cost and demand assertions, and that there are significant disparities between the projected results and rate structures for the various Tariff 12 options. *Id*. at 15-20; *id*. at 14-21. Williams argues that these

deficiencies require review of the underlying contract as well as the tariff filing, and states that the proliferation of Tariff 12 offerings requires a broader review of the Commission's approach to ISPs. *Id.* at 20-23; *id.* at 21-24.

9. In response to Sprint's assertions that these options are inconsistent with the ISPs reviewed in the *April 18 Order*, AT&T argues that the options are consistent in that they respond to customer requirements for a combination of inbound and outbound capabilities for an extended term. Furthermore, says AT&T, the options provide AT&T with the provisioning flexibility also noted in that Order. AT&T Reply (Option 17) at 2-7; AT&T Reply (Options 18-19) at 3-7. AT&T further states that MCI's contentions respecting DS-3 offerings are inapplicable to VTNS because ISPs are not like their component elements, while DS-3 arrangements provided on an ICB basis were admitted to be like access offerings. *Id.* at 5 n.**; *Id.* at 5 n.*. AT&T adds that the revisions are not restricted to a single customer, as Williams contends, and states that the different rates for VTNS options reflect cost savings particular to these arrangements, an aspect of ISPs explicitly contemplated by the *April 18 Order*. *Id.* at 5-7; *id.* at 5-7. Nor does the inclusion of minimum service element requirements conflict with that Order, AT&T claims, absent customers' assertions that such specifications operate to deny them access to VTNS service packages. As to alleged cost support deficiencies, AT&T responds that pricing differences between these and other VTNS options reflect varying service costs. *Id.* at 9-10; *id.* at 9-10.

10. The Common Carrier Bureau has reviewed AT&T's transmittals, the petitioners' assertions, and related pleadings in light of the Commission's *April 18 Order* and reconsideration thereof.[3] We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

11. Accordingly, IT IS ORDERED that the petitions to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 1810, filed by MCI Telecommunications Corporation, Sprint Communications Company Limited Partnership, and Williams Telecommunications Group, ARE DENIED.

12. IT IS FURTHER ORDERED that the petitions to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittals Nos. 1826 and 1832, filed by MCI Telecommunications Corporation, Sprint Communications Company Limited Partnership, and Williams Telecommunications Group, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In addition, the Independent Data Communications Manufacturers Association, Inc., filed a letter October 16, 1989, opposing this proposal.

[2] AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order, 4 FCC Rcd 4932 (1989) (*April 18 Order*), *recon. denied*, FCC 89-302, adopted Oct. 26, 1989.

[3] *See* note 2, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS
Revisions to Tariff F.C.C. No. 12

Transmittal Nos. 1755 and 1763

Custom-Designed Integrated Services

ORDER

Adopted: November 21, 1989; Released: November 22, 1989

By the Chief, Common Carrier Bureau:

1. AT&T Communications (AT&T) Transmittal No. 1755, scheduled to become effective November 23, 1989, would, *inter alia*, reduce rates for the mileage component of local channels provided as part of its Defense Commercial Telecommunications Network (DCTN).[1] Williams Telecommunications Group (Williams) filed a petition to reject or to suspend and investigate on September 11, 1989 (Williams Petition); AT&T filed its reply on September 21, 1989 (AT&T Reply).

2. As noted, the instant revisions would reduce by half the per mile rate for local channels provided as part of DCTN. The local channels account for approximately 26 percent of the overall DCTN offering's revenues. According to AT&T, the reductions are designed to align these rates more closely with costs "pursuant to the DCTN contract." AT&T adds that the lower rates will result in the customer's continued use of DCTN rather than turning to a competitor. Description and Justification at 2-3.

3. Williams contends that the proposed reductions in the mileage component of local channel rates cannot be reconciled with AT&T's original statements respecting DCTN costs and rate stability. Williams adds that AT&T has addressed none of the competitive necessity criteria in the *Private Line Rate Structure* Order.[2] Williams adds that competitive necessity, in any case, is a misleading argument when an exclusive contract assures AT&T against competitive inroads. Williams Petition at 2-3. Williams also argues that the reduction is contradicted by the semiannual DCTN filings, which indicate that yearly expenses for the service have increased by over 50 percent in the past three years' operations. *Id.* at 4-5.

4. AT&T replies that it attempted no competitive necessity justification, as Williams assumes is necessary, but instead presented a straightforward revenue-less-cost justification of the revisions. That justification, says AT&T, establishes that the reduced local channel rates will fully recover AT&T's access costs for DCTN service for the remaining years of the term, whether calculated on a discounted-to-present-value or on a nondiscounted basis. AT&T Reply at 2-3. AT&T contends that the cost support materials provided with the original DCTN filing demonstrated that projected costs would be covered by revenues, but did not preclude subsequent rate reductions when costs prove lower than projected. *Id.* at 4-5. As to the expense increases noted by Williams, AT&T replies that this is explained by the expansion of service. Revenues have also increased, so that expenses as a percentage of revenue declined from 92.2 percent in 1987 to 89.7 percent in 1988. *Id.*

5. The Common Carrier Bureau has reviewed AT&T's Transmittal Nos. 1755 and 1763, the petitioner's assertions, and related pleadings. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, suspend or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 1755 and 1763, filed by Williams Telecommunications Group IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] DCTN, which is offered under AT&T Tariff F.C.C. No. 12, is the product of an exclusive term contract awarded AT&T by the Department of Defense at the completion of its competitive bid process in 1984, and originally tariffed by provisions that became effective in April 1986. The Commission Order denying petitions against the offering subjected AT&T to detailed reporting requirements. Those six-monthly reports have been filed regularly since. AT&T Communications, Inc., Memorandum Opinion and Order, Mimeo No. 3502, released Apr. 3, 1986 (Com.Car.Bur.) (*DCTN Order*).

[2] Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-237

In the Matter of

Amendment of Section 73.202(b),	RM-5191
Table of Allotments,	RM-5546
FM Broadcast Stations.	
(Greeneville and Colonial Heights,[1]	
Tennessee)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1989; Released: December 4, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 51 FR 23087, June 25, 1986, proposing the allotment of Channel 290A to Greeneville, Tennessee, at the request of Burley Broadcasters, Inc. (petitioner), as that community's second FM service. In response to the *Notice*, Murray Communications ("Murray") filed a counterproposal requesting that Channel 290A be allotted to Colonial Heights, Tennessee, as that community's first FM service.[2] Petitioner failed to file comments in response to the *Notice* or file reply comments addressing the counterproposal. Murray submitted reply comments.

2. The petitioner's failure to file comments herein requires that we dismiss the request for lack of continuing interest. This action is in accordance with the Commission's policy and procedures set forth in the Appendix to the *Notice*. Therefore, we shall consider Channel 290A at Colonial Heights without the need for a community comparison.

3. Murray, in its reply comments, reiterates an interest in the allotment of Channel 290A at Colonial Heights, in the event it does not prevail in its attempt to have a Class C2 station allocated to that community in MM Docket No. 85-258 or MM Docket No. 86-218. By separate action in those proceedings, we have denied those requests.

4. Channel 290A can be allotted to Colonial Heights in compliance with the Commission's minimum distance separation requirements of Section 73.207 of the Rules. [3]

5. In view of the above, we believe the public interest would be served by the allotment of a first FM service to the community of Colonial Heights, Tennessee. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 18, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Colonial Heights, Tennessee	290A

6. IT IS FURTHER ORDERED, That the petition filed by Burley Broadcasters, Inc. (RM-5191), IS DISMISSED.

7. The window period for filing applications will open on **January 19, 1990,** and close on **February 20, 1990.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice of the Colonial Heights petition was given on August 25, 1986, Report No. 1613.

[3] The reference coordinates are 36-29-06 and 82-30-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-285

In the Matter of

Amendment of Section 73.202(b), RM-6582
Table of Allotments,
FM Broadcast Stations.
(Gould, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1989; Released: December 4, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Arkansas Radio Company (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 5007 (1989), proposing the allotment of Channel 273A to Gould, Arkansas, as that community's first local broadcast service. Petitioner submitted comments and reply comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. Channel 273A can be allotted to Gould, Arkansas, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. We believe the public interest would be served by allotting Channel 273A to Gould, Arkansas, since it could provide that community with its first local broadcast service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 18, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Gould, Arkansas	273A

4. The window period for filing applications for Gould, Arkansas, will open on **January 19, 1990,** and close on **February 20, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Ordee Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 273A at Gould, Arkansas, are 33-59-00 and 91-33-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-542

In the Matter of

Amendment of Section 73.202(b), RM-6695
Table of Allotments,
FM Broadcast Stations.
(Monroeville, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 15, 1989; Released: December 4, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Monroe Broadcasting Company, Inc. (petitioner), licensee of Station WMFC-FM, Channel 257A, Monroeville, Alabama, seeking the substitution of Channel 257C2 for Channel 257A and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 257C2 can be allotted to Monroeville at the petitioner's present site[1] in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2]

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 257C2 for Channel 257A at Monroeville, Alabama. As requested, we also propose to modify the Class A license of Station WMFC-FM to specify operation on Channel 257C2. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 257C2 at Monroeville.

4. Accordingly, in order to provide Monroeville with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Monroeville, Alabama	257A	257C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 25, 1990,** and reply comments on or before **February 9, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Jeffrey D. Southmayd, Esq.
Southmayd Powell & Taylor
1764 Church Street
Washington, DC 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the petitioner's licensed site for Channel 257A at Monroeville are 31-30-51 and 87-17-55.

[2] The required spacings separations are met based upon the issuance of a construction permit to Station WKSM(FM), Fort Walton, Florida, on Channel 258C2 (BPH-880106IC) at coordinates 30-24-51 and 86-37-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-491

In the Matter of

Amendment of Section 73.202(b),	RM-6371
Table of Allotments,	*RM-6650*
FM Broadcast Stations.	
(Vacaville and *Middletown*, [1]	
California)	

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: November 15, 1989; Released: December 4, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the request of Joe L. and L. Ann Gross ("petitioners") seeking the allotment of a Class A FM channel to Middletown, California, as its first local FM service. Petitioner filed its petition as a counterproposal to the *Notice of Proposed Rule Making*, 3 FCC Rcd 6128 (1988), which proposed the substitution of Channel 237B1 for Channel 237A at Vacaville, California, and modification of the license for Station KUIC(FM), as requested by Quick Broadcasting, Inc. As stated in a separately adopted *First Report and Order* in this proceeding, we have determined that Channel 254A can be allotted to Middletown consistent with the Commission's Rules. However, since Middletown is not listed in the U.S. Census, and does not appear to be incorporated, we declined to allot the channel absent further demographic data.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Middletown is not listed in the U.S. Census.[2] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Middletown is incorporated, or that it has businesses, social organizations or governmental units that identify themselves with Middletown. *See Ansley, AL*, 46 FR 58688 (1981); *Cascade Village, CO*, 48 FR 19917; *Ellwood, CA*, 50 FR 13031 (1985).

3. A staff analysis has determined that Channel 254A can be allotted to Middletown without the imposition of a site restriction. [3]

4. We believe the public interest would be served by seeking further information on the status of Middletown as a community for allotment purposes since the proposal could provide it with a first local FM service. However, this *Further Notice* does not afford additional opportunity to file counterproposals since an opportunity to file such proposals was provided in response to the *Notice*. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Middletown, California, as follows:

	Channel No.	
City	Present	Proposed
Middletown, California	–	254A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 25, 1990,** and reply comments on or before **February 9, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners' counsel, as follows:

Vincent J. Curtis, Jr., Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Ave., NW
Suite 400
Washington, DC 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Middletown has been added to the caption.

[2] We do note that Middletown is listed in the 1988 Rand McNally Commercial Atlas with a population of 2,000. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, MS*, 48 FR 5974 (1983).

[3] Coordinates used for Channel 254A at Middletown are 38-45-12 and 122-36-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-34

In the Matter of

Amendment of Section 73.202(b),	RM-5603
Table of Allotments,	RM-6235
FM Broadcast Stations.	
(Drakesboro and Madisonville Kentucky)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 13, 1989; Released: December 4, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Madisonville Media ("Madison"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 1513 (1987), proposing the allotment of Channel 295A to Madisonville, Kentucky, as that community's second FM service. In response to the *Notice*, Janice L. O'Brien ("O'Brien") filed a counterproposal requesting the allotment of Channel 295A to Drakesboro, Kentucky, as a first local service.[2] Madison filed comments and reply comments supporting the allotment to Madisonville. Martin L. Hensley filed comments in response to the counterproposal.

2. Madison, in its comments, restates its intention to apply for the channel, if allotted. In its reply comments, Madison states that Drakesboro has a population of only 798, is not a part of any urbanized area, and because of its small population would not able to support a local service. Madison further states that Channel 295A at Drakesboro would be short-spaced to Station WBLG, Channel 296A, Smith's Grove, Kentucky. Madison concludes that Channel 228A can be allotted to Drakesboro without precluding the allotment of Channel 295A to Madisonville.

3. After consideration of the information filed in this proceeding, we conducted a frequency search which found alternate Channel 280A for allotment to Drakesboro. In view of the availability of an alternate Class A channel to Drakesboro, a comparative analysis is unnecessary. We believe the public interest would be served by allotting Channel 280A to Drakesboro, Kentucky, as a first local FM service, and Channel 295A to Madisonville, Kentucky, as a second service.

4. Channel 280A can be allotted to Drakesboro in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.6 kilometers (4.1 miles) southeast in order to avoid a short spacing to Station WIKY(FM), Channel 281B, Evansville, Indiana. Channel 295A can be allotted to Madisonville in compliance with the Commission's minimum distance separation requirement.[3]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 18, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Drakesboro, Kentucky	280A
Madisonville, Kentucky	230C2, 295A

6. The window period for filing applications will open on **January 19, 1990,** and close on **February 20, 1990.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Drakesboro has been added to the caption.

[2] Public Notice of the counterproposal was given on June 2, 1989, Report No. 1781 (RM-6235).

[3] The coordinates for Channel 280A at Drakesboro are North Latitude 37-09-57 and West Longitude 87-00-41. The coordinates for Channel 295A at Madisonville are North Latitude 37-19-41 and West Longitude 87-29-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-584

In re Applications of

EDWIN A. BERSTEIN	File No. BPH-870330NC
RADIO CENTER MORICHES LIMITED PARTNERSHIP	File No. BPH-870331MV
DAKK, INC.	File No. BPH-870331ND
VERTICAL BROADCASTING, INC.	File No. BPH-870331OQ
GATEWAY BROADCASTING	File No. BPH-870415KR
FRIENDSHIP COMMUNICATIONS, LTD.	File No. BPH-870415KS
HAMPTON COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KY
THE LEFEBVRE GROUP	File No. BPH-870415MF

For Construction Permit for a
New FM Station on Channel 241A
at Center Moriches, New York

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1989; Released: December 6, 1989

By the Review Board: MARINO (Chairman) *, BLUMENTHAL, and ESBENSEN.

1. The Review Board has under consideration: an Appeal, filed September 18, 1989, by The Lefebvre Group (Lefebvre), pursuant to 47 CFR §1.301(a)(1); a Motion to Strike, filed September 19, 1989, by Edwin A. Berstein; a Supplement to Appeal, Motion to Strike, Request for Oral Argument, filed October 11, 1989 by Lefebvre; and related pleadings. The appeal stems from two rulings by presiding Administrative Law Judge Edward Luton (ALJ) which: (1) rejected for lack of "good cause" a financial amendment filed by Lefebvre on August 4, 1989; and (2) dismissed Lefebvre's application. *Memorandum Opinion and Order*, FCC 89M-2245, released September 11, 1989. For the reasons set forth below, we will deny the appeal.

BACKGROUND

2. In its application, filed April 15, 1987, Lefebvre could not then certify that is was financially qualified, [1] representing instead that it was *"in the process of finalizing its financing arrangements."* Approximately twenty-one months later (on January 26, 1989), the Mass Media Bureau designated Lefebvre's application for consolidated hearing, along with the seven other mutually exclusive applications captioned above. But, the designation order (for reasons not apparent) failed to specify a financial issue against Lefebvre, despite the fact that it had never amended to affirm its securance of financing. *Edwin A. Berstein*, 4 FCC Rcd 802 (1989).

3. Thereafter, the ALJ assigned to try this case issued his procedural schedule, setting July 24, 1989 as the exhibit exchange date, and August 7, 1989 for initiation of the actual evidentiary hearing. *Order*, FCC 89M-1107, released April 7, 1989. However, shortly after hearing designation (*i. e.*, March 30, 1989), a competing applicant filed against Lefebvre a "Petition To Add A Financial Issue," since Lefebvre still had not amended its application to certify as to its financing. [2] Lefebvre did not respond to that petition until May 23, 1989, but its response conceded "that addition of a financial issue is warranted." *Order*, FCC 89M-1814, released July 7, 1989, because it *still* had not secured financing. Nearly one month later (*i. e.*, June 19, 1989), Lefebvre's purported sole "general" partner, Virginia Lefebvre, holding a 10% equity share, was deposed. She there admitted that her putative financier, Leonard Ackerman (Lefebvre's alleged 90% equity owner), had *still* not agreed to subsidize the broadcast venture. Moreover, questioned about her financing from the outset, Ms. Lefebvre answered:

> A. Well, I didn't have a bank commitment at that [application filing] time. I didn't have complete financial backing. I didn't -- I hadn't gone to the banks yet when this application was filled out.
>
> Q. What information regarding financial qualifications did you have as of the date that you executed the application?
>
> * * *
>
> A. Just Mr. Ackerman's commitment to the partnership.
>
> Q. Did Mr. Ackerman commit to provide the construction and operating funds for the partnership?
>
> A. Not the total financing, no.
>
> Q. Did you have any commitment for the total financing as of the time the application was signed?
>
> A. No, I didn't have bank commitments.
>
> Q. Did you ever prepare or did you ever see a budget for the construction and operating cost of your proposed station?
>
> A. No.
>
> Q. To your knowledge, has that document ever been prepared or has a document ever been prepared which sets forth the budgets of the construction an operating costs?
>
> A. Not that I'm aware of, no.

Q. Are you now seeking to become financially qualified? In the future, do you propose to become financially qualified, that is The Lefebvre Group?

A. The attorneys are handling that for me.

Q. *What's the status of your efforts in this regard, if you know* ?

A. *There's nothing definite at this point.*

Q. *Do you have an understanding in your head as to when this will be resolved* ?

A. *I would hope in the next month.*

Tr. 74-76 (emphasis added).

4. For his part, Leonard Ackerman conceded at deposition that neither he nor the applicant had taken any serious steps toward becoming financially qualified subsequent to the April 1987 filing of the Lefebvre application. Ackerman averred:

Q. Did you obtain a commitment from a bank?

A. I don't believe I did. I don't think I obtained a written commitment.

* * *

I don't recall producing a written commitment. I know I talked with various banks and discussed it with banks. There has been such an activity on this. I haven't had a conversation with anyone in so many months that I never followed it up. It's really the first time I had any conversation with anyone.

Q. No one asked you to follow it up?

A. No.

Q. Including Ms. Lefebvre?

A. Right.

Q. The meeting that you had when you executed the limited partnership agreement, did you talk with Ms. Lefebvre and/or Mr. Lasch about your willingness to obtain a letter of commitment?

A. Yes, I did.

Q. That discussion occurred in her presence?

A. Yes.

Q. Subsequent to that you did make the inquiry?

A. Yes, I asked her where she banks and I told her where I bank. I told her you should make inquiry and I certainly will make inquiry on my behalf. I am familiar with this.

Q. It never reached--

A. I never followed it up.

Q. You never followed it up for what reason?

A. Because the application was sitting there dormant for all I knew and I expected when I would be called upon to produce it, that wasn't difficult. No one said that we need it, Lenny. If they did, I would have produced it.

Tr. 26-28. However, Ackerman lost interest in the venture and never sought bank financing, nor did Lefebvre seek an alternative source until months *after* the evidentiary hearing had been designated. The record thus reveals that Lefebvre was not qualified when it filed in April 1987; that it took no serious measures to become qualified for the ensuing twenty-one months; that it was not qualified upon its application's designation for consolidated comparative hearing; and that it continued to be financially unqualified for the six months following hearing designation, including a period of several months *after* the filing of the petition for a financial issue against it, an issue it conceded was fully warranted.

5. Nonetheless, on August 4, 1989, and without proffering a "good cause" showing for its proposed amendment, Lefebvre sought to qualify financially by replacing its 90% equity holder (Ackerman) with a new "limited" partner (H.G. Investment, Inc.). However, holding that Lefebvre had not met the strict, six-point "good cause" test for post-hearing designation amendments set forth in *Erwin O' Conner Broadcasting Co.*, 22 FCC 140, 143 (Rev. Bd. 1970), [3] the ALJ rejected the late Lefebvre amendment, and he summarily dismissed its application. Despite its admitted lack of basic financing for the nearly twenty-seven months following the filing of its deficient application, Lefebvre argues that it should be permitted to amend purely as a matter of "equity," since it has "incurr[ed] significant legal expenses to prosecute its application." [4] It also argues that it did not lack diligence and that its reinstatement would cause no disruption to the other seven applicants. (*But see infra* note 6.)

DISCUSSION

6. We reject Lefebvre's appeal. As the Board recently reminded in *Tri -State Communications*, FCC 89R-72, released November 22, 1989, a broadcast applicant must be "ready, willing and able" to meet the Commission's financial requirements, certainly once the hearing has been designated, unless some unanticipated event requires an application amendment. *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1978). *See also Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1028 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd by judgment sub nom. Royce Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985); *Northampton Media Associates*, 3 FCC Rcd 5164, 5169 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 5517 (1989); *Pepper Schultz*, 103 FCC 2d 1052, 1056 (Rev. Bd. 1986), *aff'd in pertinent part*, 2 FCC Rcd 1476 (1987) (subsequent history omitted); *Washington's Christian Outreach Inc.*, 99 FCC 2d 395, 404-405 (Rev. Bd. 1984) (subsequent history omitted). Here, and by its own admission, Lefebvre was not qualified when it filed in early 1987, took no steps to correct this critical deficiency until nearly seven months *after* hearing designation, and cannot meet the rigorous "good cause" test for "post-designation amendments" set forth in 47 CFR § 73.3522(b) at this late date. Regardless, it cites to *Citylight Communications, Inc.*, 4 FCC Rcd 1676, 1677, (1989), where the Mass Media Bureau noted its "consistent and long-standing practice of accepting applications which fail to certify the financial qualifications of the applicant. The remedy of failure to certify is not dismissal, but amendment or, failing that, specification of a financial qualifications issue against the relevant applicant." However, Lefebvre does not, and cannot, assert that it was, or could have been, financially qualified within thirty days of hearing designation, even had a financial issue been expressly specified against it in the Bureau's January 1989 hearing designation order. [5]

Indeed, as witness the deposition testimony of its two principals, Lefebvre remained passive and financially unqualified for nearly six months *after* hearing designation. Plainly, the representation in its 1987 application that it was then *"in the process of finalizing its financing* arrangements" was without factual foundation. [6] *Citylight* is therefore inapposite and unavailing.

7. In view of Lefebvre's utter lack of diligence, [7] and its unarguable failure to meet the required "good cause" test for post-desigation amendments, the dismissal of its application was clearly the appropriate remedy. No equities whatever excuse this applicant's slothfulness. We cannot permit an applicant to disrupt a proceeding by simply substituting its erstwhile 90% owner on the eve of the hearing, when it has known for the twenty-seven months prior thereto that it had no financing, and never sought in a diligent, timely manner the most basic resource it needed to legally prosecute its application.

8. ACCORDINGLY, IT IS ORDERED, That the Appeal filed September 18, 1989 by the Lefebvre Group IS DENIED; and

9. IT IS FURTHER ORDERED, That the Motion to Strike, filed September 19, 1989 by Edwin A. Berstein IS DENIED; and that the Supplement to Appeal, Motion to Strike, Request for Oral Argument, filed October 11, 1989 by The Lefebvre group IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

* Chairman Marino concurs for the reasons set out in notes 5 and 6, below.

[1] Prior to the Commission's most recent revision of its application form in *Revision of Form 301*, 4 FCC Rcd 3853 (1989), an applicant was permitted to merely check either "Yes" or "No" in Section III of the application form. Where the box was checked "No," a financial hearing issue was routinely designated against that deficient applicant. *See id.*, at 3868 n.71.

[2] Petition to Enlarge Issues, filed March 30, 1989, by CM Broadcasting Limited Partnership.

[3] The amending party must demonstrate that: (1) it acted with due diligence; (2) the proposed amendment was not required by the voluntary act of the applicant; (3) no modification or addition of issues or parties would be necessitated; (4) the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) the other parties will not be unfairly prejudiced; and (6) the applicant will not gain a competitive advantage. *Erwin O'Connor, supra.*

[4] Lefebvre Appeal at 3.

[5] Pursuant to our amendment rule, 47 CFR § 73.3522(b)(2), an applicant is given thirty days after designation as "a matter of right" to cure any fatal deficiency. Lefebvre has been fully aware from the outset that it had no financing, and it did not seek to amend under the above cited rule to cure its critical financial deficiency. No doubt, because it missed even that critical post-designation deadline, Lefebvre does not invoke or rely upon the aforecited thirty-day rule.

[6] But for the fact that we affirm the dismissal of Lefebvre's application, a misrepresentation/lack of candor inquiry would be necessary against it, based upon this apparently fallacious representation. *See, e.g., Duchess Communications*, 101 FCC 2d 243, 249 n.13 (Rev. Bd. 1985).

[7] Lefebvre was not "diligent but the victim of a 'run of bad luck'," as the applicant in *Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 30 (Rev. Bd. 1982). Rather, it sat back, *ab initio*, and allowed its application to go forward without making any serious effort to become financially qualified. It has, therefore, wasted the public's time and resources, with only the hollow husk of a broadcast application. Its appeal here is not only unjust, but a continuation of its gamesmanship.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

HENRY R. MALLOY, JR. d/b/a REM MALLOY BROADCASTING	File No. BPH-860627MH
PEEBLES BROADCASTING COMPANY	File No. BPH-860603ME
JAMES S. LEE and DONALD L. BAKER d/b/a INTERACTIVE MEDIA	File No. BPH-860707MS
FREE AIR CORPORATION	File No. BPH-860707NH
CLEAR CHANNEL COMMUNICATIONS, INC.	File No. BPH-860707NV
BERNARD DAWSON	File No. BPH-860707NW

For Construction Permit for a
New FM Station on Channel 275A
Raleigh, North Carolina

Appearances

Mark J. Prak and *Randall M. Roden*, on behalf of Henry R. Malloy, Jr., d/b/a Rem Malloy Broadcasting; *Gary S. Smithwick* and *Arthur V. Belendiuk*, on behalf of Peebles Broadcasting Company; *Michael J. Wilhelm*, on behalf of James S. Lee and Donald L. Baker d/b/a Interactive Media; *Stephen T. Yelverton*, on behalf of Free Air Corporation; *Joel H. Levy* and *Richard A. Helmick*, on behalf of Clear Channel Communications, Inc.; *Lawrence J. Bernard, Jr.*, on behalf of Bernard Dawson; and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: November 28, 1989; Released: December 5, 1989

Preliminary Statement

1. The mutually exclusive applications of Henry R. Malloy, Jr., d/b/a Rem Malloy Broadcasting (Malloy), Peebles Broadcasting Company (Peebles), James S. Lee and Donald L. Baker, d/b/a Interactive Media (Interactive), Free Air Corporation (Free Air), Clear Channel Communications, Inc. (Clear) and Bernard Dawson (Dawson) for permission to construct a new FM station on Channel 275A at Raleigh, North Carolina were designated for hearing together with four other applications which subsequently were dismissed by *Hearing Designation Order* (*HDO*), DA 88-904, released July 19, 1988, 53 *Fed. Reg.* 27900, (July 25, 1988) on the following issues:[1]

> 1. To determine with respect to the following applicants whether the applicants are financially qualified: Dawson.
>
> 2. To determine which of the proposals would on a comparative basis best serve the public interest.
>
> 3. To determine in light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted, if any.

2. The *HDO* also ordered that the areas and populations to be served by the various applicants be considered under Issue 2. *HDO* ¶ 14. However, the parties have stipulated that the differences in comparative coverage were so insubstantial as to be of no decisional significance (Jt. Eng. Ex. 1).

3. A prehearing conference was held on September 22, 1988 and hearing sessions were held on January 9, 10, 11 and 12, 1989. The record was closed by *Order*, FCC 89M-650 released February 27, 1989. Proposed findings of fact and conclusions of law were filed April 28, 1989. Replies were filed May 12, 1989.

Findings of Fact
Rem Malloy Broadcasting (Malloy)

4. Henry R. Malloy, Jr. is an individual applicant and will be the sole owner and proprietor of the proposed station (Malloy Ex. 1).

Diversification

5. Malloy does not own any interest in any medium of mass communications (Tr. 65). At the time of the hearing, Malloy was employed as General Manager of Radio Station WSRC(AM), Durham, North Carolina (Malloy Ex. 1). Upon assuming this job, Malloy notified the Commission that in the event he is awarded the construction permit, he would resign his employment as General Manager of Radio Station WSRC (Malloy Ex. 1, ¶ 3). Subsequent to the hearing, Malloy did, in fact, terminate his employment with Radio Station WSRC. *Order*, FCC 89M-1174 (released April 14, 1989).

Integration

6. Malloy will serve as the full-time General Manager of the station devoting 40 hours or more per week to the job. Malloy's duties will include, but will not be limited to, establishing and implementing policies and procedures for the station. He will have overall supervisory respon-

sibility for all aspects of the day-to-day operation of the station. The sales manager and program director will report to him (Malloy Ex. 1, ¶ 3; Tr. 88, 95, 115).

7. Malloy is a Black male. He currently resides in Chapel Hill, North Carolina. He has lived in Chapel Hill since approximately 1973 (Malloy Ex. 1; Tr. 85-86). Chapel Hill is not located within the 1 mV/m service contour of Malloy's proposed station (Malloy Ex. 1). From 1972 through 1973, Malloy lived in Chatham County. From 1945 to 1972, he lived in Winston-Salem, North Carolina. These past residences are not located within the 1 mV/m service contour (Tr. 87-88). Malloy proposes to move his residence to Raleigh, North Carolina, if awarded the construction permit (Malloy Ex. 1).

8. Malloy claims enhancement credit for civic involvement based on his participation in a civil rights demonstration which took place in Raleigh, North Carolina, in the early 1960's. Malloy was one of the organizers of the Winston-Salem Chapter of the Congress of Racial Equality, which sponsored the demonstration (Malloy Ex. 1). He devoted approximately five hours to actually participating in the demonstration itself (Tr. 99). He also spent an unspecified amount of time in organizing the demonstration over a two to three week period (Tr. 156).

9. From August of 1983 through May of 1984, Malloy was employed as an account executive at Radio Station WSRC(AM), Durham, North Carolina. His duties included selling advertising, drafting advertising copy, servicing and collecting accounts (Malloy Ex. 1, ¶ 8; Tr. 108-109). From June 11, 1984 through December 28, 1984, Malloy was employed as an account executive by radio stations WDNC(AM) and WDCG(FM), Durham, North Carolina. His duties included selling advertising, servicing and collecting accounts (Malloy Ex. 1, ¶ 8; Tr. 109). From January 18, 1988 to February 27, 1989, Malloy was employed by Radio Station WSRC(AM), Durham, North Carolina, as General Manager (Malloy Ex. 1, ¶ 8). His duties included exercising overall supervisory authority for the station's daily operations and implementing policies and procedures established by the station owner (Malloy Ex. 1, ¶ 8). In his capacity as General Manager, Malloy supervised 12-13 employees (Tr. 115).

Auxiliary Power

10. Malloy will purchase and cause to be constructed and installed auxiliary power generation facilities at both the studio and transmitter sites for the station so as to ensure the continuity of its proposed broadcast service in the event of a power outage (Malloy Ex. 1, ¶ 10; Tr. 166, 183).

Peebles Broadcasting Company

11. Peebles Broadcasting Company (Peebles) is a North Carolina Corporation. It has two classes of stock. Peebles is authorized to issue 1000 shares of common voting stock, and 2000 shares of preferred nonvoting stock. Millard R. Peebles, Jr. holds 100% of the common voting stock of Peebles, which represents 25% of the equity of the corporation. He is President, Treasurer and Director of the corporation. Brigitte M. Peebles, his wife, is Secretary of the corporation. She holds no stock. Inez Peebles, his cousin, holds 75% of the equity of Peebles. All her ownership interest in the corporation is preferred nonvoting stock. She is neither an officer nor a director of the corporation (Peebles Ex. 1).

12. The Peebles Articles of Incorporation were filed with the Secretary of State for the State of North Carolina on July 2, 1986 (Peebles Ex. 1, Att. A). The Articles provide for two classes of stock -- voting common stock and nonvoting preferred stock.

13. The corporate Bylaws of Peebles Broadcasting Company, as amended on September 12, 1986, fully insulate the nonvoting stockholder from any material involvement in the day-to-day managerment and operations of the proposed station (Peebles Ex. 1, Att. C). A resolution was passed, on September 12, 1986, by the Board of Directors adopting the Bylaws, as amended (Peebles Ex. 1, Att. C).

14. On the advice of its accountant, Peebles has not yet issued stock certificates to its stockholders (Tr. 233, 267). The exact number of shares to be issued to each will be determined when the corporation commences business, after the construction permit is issued to the applicant (Peebles Ex. 1). Mr. Peebles testified that he has blank stock certificates in his possession, and ready to be issued when Peebles is awarded the construction permit (Tr. 230-231).

15. Prior to incorporation, Mr. Peebles decided how the equity would be split and Inez Peebles agreed with his decision (Tr. 206). The equity will be divided as stated above, and Millard R. Peebles, Jr., will hold 100% of the voting stock of the corporation (Peebles Ex. 1). Section II of Peebles' FCC Form 301 application is consistent with the principals' intent that Mr. Peebles own all of the issued voting stock, equivalent to twenty-five percent of the equity, and that Inez Peebles own nonvoting stock equivalent to seventy-five percent of the equity (Official Notice taken). Mr. Peebles intended, from the very beginning, to be the controlling principal of the applicant (Tr. 204, 277-278). Inez Peebles never intended to be involved in the management and operation of the station. She testified that this venture is "merely an investment" for her (Tr. 328-329). There is no evidence in the record showing that Inez Peebles has participated in the preparation of and prosecution of Peebles application. Her testimony as to her "passive" involvement has not been challenged.

16. Mr. Peebles and Inez Peebles have shared in the payment of application and prosecution costs on a fifty-fifty basis (Tr. 209, 227). They have each spent between $9,000 and $13,000 in connection with the Peebles application (Tr. 273-274, 326). The amount of money contributed by each, thus far, is greater than the amount required from each to pay for their respective shares of stock (Tr. 228, 282-283). Inez Peebles does not regard the money she has contributed as a loan, and does not expect repayment of the funds (Tr. 330). Peebles proposes to rely on a bank loan to finance the costs of construction and three months operating expenses (Tr. 260, 261; Dawson Ex. 7). Mr. Peebles and Inez Peebles have agreed to pledge real estate as collateral for the loan (Tr. 261, 262). Also, both have agreed to guarantee repayment of the loan (Tr. 295-296).

Diversification

17. Peebles has no other interests in other media of mass communications. Neither the voting stockholder, Millard Peebles, nor the nonvoting stockholder, Inez Peebles, have any interests in other media of mass communications. Millary Peebles is currently employed at television station WLFL, Raleigh, North Carolina. Mr.

Peebles has pledged to terminate his employment at the television station upon grant of the construction permit to Peebles (Peebles Ex. 2.)

Integration

18. Millard R. Peebles, Jr., one hundred percent voting stockholder of Peebles, will work full-time at the proposed station as General Manager. He will devote a minimum of forty hours per week to this position. As General Manager, Peebles will have sole authority over the management and operation of the station including making decisions concerning the day-to-day operations of the station, program format, hiring and firing of employees, all final sales and financial decisions, and engineering decisions. In general, he will perform all those functions necessary and required customarily of a general manager of an FM station (Peebles Ex. 2).

19. Peebles, who is Black, currently resides in Raleigh, North Carolina. Peebles has lived in Raleigh for most of his life. He lived in Raleigh from 1958 to 1976. In 1976, he moved to Hampton, Virginia, where he resided until 1980. From May of 1980 until September of 1981, he again resided in Raleigh. Peebles moved back to Raleigh in 1983, and has lived there since that time. All of Peebles' residences within Raleigh were, or are, within the city-grade (3.6 mV/m) and principal (1.0 mV/m) service contours of the proposed station (Peebles Ex. 2).

20. Peebles attended college at Hampton Institute, now Hampton University, in Hampton, Virginia, from June, 1976 to May 1980. During the holidays from 1978 to 1981 he was a part-time volunteer announcer at Radio Station WSHA(FM), Raleigh, North Carolina. From September, 1978 to May, 1980, Peebles worked part-time at WHOV(FM), Hampton, Virginia, as Program Director/News Director. From May, 1979 to August, 1979, Peebles was an intern at WRAL(TV), Raleigh, North Carolina, where he operated, on a part-time basis, a camera, audio and teleprompter. From September, 1978 until May 1980, he was a part-time assistant engineer at WHOV(FM). From September, 1978 until May, 1989, Peebles was a part-time engineer for News Watch 10 on Warner Cable, Hampton, Virginia. From March to May, 1980, he was a part-time photographer's assistant at WTAR(TV), Norfolk, Virginia. In May, 1980 he returned to Raleigh and became employed full-time at WRAL(TV), Raleigh, North Carolina, as an audio console operator until September of 1981. From September, 1981 to August, 1983, Mr. Peebles was General Manager of WHOV(FM), Hampton, Virginia, which is licensed to Hampton Institute. From October, 1983 to present, Peebles has been employed at WLFL(TV), Raleigh, North Carolina. He was employed from 1983 to April, 1988 as Master Control Operator. He did not supervise other employees (Tr. 251). On April 25, 1988 he became Master Control Supervisor of WLFL(TV) (Peebles Ex. 2, pp. 2-3).

21. Millard R. Peebles is a member of the Raleigh-Wake Citizens Association (1985-present) and devotes approximately two hours a month to that organization. He is a member of NAACP-Raleigh/Apex Chapter (1986-present) and devotes approximately two hours a month to that activity. He is a member of the Martin Street Baptist Church (1983-present) and has been Chairman of the Telecommunications Ministry as well as Director of Church Productions (Peebles Ex. 2; Tr. 298-302).

Auxiliary Power

22. Peebles will utilize auxiliary power generating equipment at the proposed transmitter and studio locations, in order to continue operating in the event of a power outage (Peebles Ex. 3).

Interactive Media

23. Interactive Media is a general partnership with two partners, James S. Lee and Donald L. Baker. Lee owns 60% of the partnership equity, Baker 40% (Interactive Media Ex. 2, p. 1).

24. Interactive Media's partnership agreement is oral. Written reference to the fact of partnership between Lee and Baker was first made in a document "Five-Year Plan for Development of a New FM Radio Station in Raleigh North Carolina," prepared, jointly, by the partners before the construction permit application was filed (Interactive Media Ex. 2; Interactive Media Ex. 6; Peebles Ex. 4).[2] The applicant was described as a general partnership, with the above-described equity division, in Section II of Interactive Media's construction permit application (Interactive Media Ex. 2).

25. The partners contribute capital to the partnership in proportion to their equity percentages (Tr. 389). Profits and losses will be distributed in the same manner (Tr. 381, 556). However, the partners will be paid equal salaries for their work at the proposed station (Tr. 381). The partners are responsible for repayment of bank loans *pro rata* their equity interest (Tr. 391). Lee testified that each partner has a right of first refusal if the other partner elects to sell his interest (Tr. 387-388). He interprets "right of first refusal" to mean that neither he nor Baker "can do anything to liquidate or move or change his share of the equity without the consent of the other" (Tr. 388). Baker, on cross-examination, testified that he did not have "any specific agreement with Lee regarding what would happen if one partner to the partnership chooses to withdraw" (Tr. 556). The partners have an obligation to communicate with one another respecting partnership activities, (Tr. 380), and to operate in good faith (Tr. 380-381). Partnership decisions are made on a consensus basis (Tr. 393, 554). Baker believes that if a consensus were not possible, that Lee's view would prevail because he holds the majority of equity (Tr. 555).

Diversification

26. Neither Interactive Media nor its partners holds any interest in the media of mass communications (Interactive Media Ex. 1).

Integration

27. James Lee and Donald Baker propose to be integrated into the management of the proposed station. Each will work a minimum of 40 hours pwer week at the station. James Lee proposes to serve as the General Mnaager of the station with overall responsibility for its operations, including, without limitation, the responsibility for the hiring and firing of other management level personnel and administration of the station's equal opportunity program. Donald Baker proposes to be Program Director of the station with authority over all program content and supervision of on-air personnel, program personnel and other staff performing programming related

duties. Baker will have, without limitation, the authority to hire and fire personnel under his supervision (Interactive Media Ex. 3, p. 4).

28. Both Lee and Baker are black (Interactive Media Ex. 3, p. 7). Both reside in Durham, North Carolina, outside the proposed 1 mV/m contour. Lee resided within the proposed 1 mV/m service contour of the station for a total of 8 years while attending college.[3] He does not currently reside in Raleigh but would move his residence to Raleigh if Interactive Media is granted a permit. Baker will establish a residence in Raleigh if Interactive Meida is granted a construction permit.

29. Lee has been involved in the following civic organizations serving the Raleigh service area:

Direct Action For Racial Equality - Lee was President of this organization from 1965 to 1970, devoting an average of 8 hours per week to the organization's activities.

Raleigh Citizens Association - Lee was a member of this organization from 1966 to 1970 devoting an average of 1 hour per week to the organization's civic activities.

YMCA - Lee was a committee member of a YMCA youth tutorial program from 1957 to 1960 devoting an average of 4 hours per week in the organization's activities.

Youth Educational Services - Lee was a member of the organization's youth tutorial program from 1965 to 1970 devoting an average of 2 hours per week to the organization's civic activities.

Catholic Social Ministries - From 1983 to 1986 Lee was a member of the Board of Directors of this organization based in Raleigh which provide social and charitable services to the Raleigh Diocese of the Catholic Church .

Fund For Southern Communities - From 1981 to 1983 Lee devoted 80 hours per year to the activities of this organization, regional in nature, which sponsored and funded grass roots self-help projects in southern communities, including Raleigh.

The Carolina Community Project - Lee devoted an average of 3 hours of time each month from 1984 to 1986 in the activities of this organization devoted to economic development, resolution of environmental issues and voter registration.

(Interactive Media Ex. 3, pp. 5, 6 7).

30. Baker is a member of the Wake Men's and Women's Association For the Advancement of Blacks devoted to the advancement of social progress in the Wake County community. He attends meetings monthly in Raleigh and has been a member of this organization since 1983 (Interactive Media Ex. 3, p. 7).

31. Donald Baker has produced and hosted radio programs on stations WAFR-FM, WDBS-FM, WVSP-FM, WDUR-FM and WSHA-FM (Interactive Media Ex. 4, p. 10). From 1985-1987, Baker was the director of station WSHA-FM. *Id.* His production credits include, without limitation, a series of 30-minute radio programs produced for the North Carolina Division of Science and Technology and public service announcements for the U.S. Department of Education. Baker was co-producer of several half-hour drams for children, which were awarded the Corporation for Public Broadcasting's award for children's broadcasting. *Id.*

32. James Lee was co-founder of the Licensee of WVSP(FM) a full-power FM broadcast station in Warrenton, North Carolina, and worked at the station for a 6-year period. His duties there included administration, program production, staff supervision and engineering. Lee was responsible for the design, construction and operation of the station (Interactive Media Ex. 4, p. 8; Tr. 422-423). For 3 years, Lee served as Executive Producer of Africa News Audio, which produced programs for broadcast over commercial and non-commercial radio stations. *Id.* (Tr. 428). He also was responsible for the design and construction of the organization's studio (Interactive Media Ex. 4, p. 9). From 1984 to date, Lee has served as a technical and production consultant to Africa News Audio. *Id.* Lee has been associated with North State Public Video for 10-years and for the past 3-years has been a member of the non-profit organization's board of directors (Tr. 430-432). The organization produces public service television programs (Interactive Media Ex. 4, p. 9). Lee has produced several radio and television programs carried nationwide. *Id.*

Auxiliary Power

33. Interactive Media proposes use of auxiliary power to permit operation of the proposed station, without interruption, in the event of commercial power failure (Interactive Media Ex. 5, p. 11).

Free Air Corporation (Free Air)

Diversification

34. Free Air is a North Carolina corporation. The sole stockholders, officers and directors are Olga V. Castellanos and Sarah J. Estrada. Neither Free Air nor any of its principals, Olga V. Castellanos or Sarah J. Estrada, have any ownership or other interest in any media of mass communications (Free Air Ex. 3).

Integration

35. Free Air proposes no integration of its ownership into management (Free Air Ex. 1).

Auxiliary Power

36. Free Air proposes to provide auxiliary power (Free Air Ex. 2).

Clear Channel Communications, Inc. (Clear)

37. Clear is a Texas corporation authorized to issue ten million shares of common voting stock with a par value of ten cents per share and two million shares of preferred voting stock with a par value one dollar per share. As of August 1, 1988, there were 3,903,023 shares of common voting stock issued and outstanding. Clear is a publicly traded corporation with approximately 32% of the shares owned by the investing public and 68% of the shares owned by officers, directors and affiliates (Clear Ex. 1).

Diversification

38. Clear is the licensee of the following broadcast stations: WOAI(AM) and KAJA(FM), San Antonio, Texas; KPEZ(FM), Austin, Texas; KXTC(AM) and KHYS(FM), Port Arthur, Texas; KTAM(AM) and KORA(FM), Bryan, Texas; KAKC(AM) and KMOD(FM), Tulsa, Oklahoma; KTOK(AM) and KJYO(FM), Oklahoma City, Oklahoma; WELI(AM), New Haven, Connecticut; WQUE(AM) and WQUE-FM, New Orleans, Louisiana; and WHAS(AM) and WMAZ(FM), Louisville, Kentucky. Clear also owns 100% of the stock of Clear Channel Television, Inc., licensee of Stations WPMI(TV), Mobile, Alabama, and KTTU-TV,[4] Tucson, Arizona (Clear Ex. 2).

39. Clear is the licensee of Low Power Television Station K28AK, College Station Texas and the permittee of Low Power Television Stations K22BH, Corpus Christie, K17BY, San Antonio, K62CY, Waco, all in Texas, and K69EK, Oklahoma City, Oklahoma (Clear Ex. 2).

40. Clear is the owner and operator of Oklahoma News Network, a satellite-delivered network, serving stations primarily in Oklahoma (Clear Ex. 2).

41. L. Lowry Mays, Clear's President, Chief Executive Officer and Chairman of the Board, is a member of the Board of Regents of Texas A&M University, licensee of KAMU-TV and KAMU-FM (educational), College Station, Texas (Clear Ex. 2). B. J. McCombs, a director and stockholder of Clear, owns 30% of San Antonio Channel II, Inc., permittee of Low Power Television Station KO2MX, San Antonio, Texas (Clear Ex. 2).

Integration

42. Clear does not propose to integrate any of its principals into the day-to-day operations of the proposed station (Clear Ex. 1).

Auxiliary Power

43. Clear does not propose auxiliary power facilities.

Bernard Dawson (Dawson)
Comparative Issue

44. Bernard Dawson is an individual applicant (Dawson Ex. 2).

Diversification

45. Dawson has no ownership interest in any medium of mass communications and will terminate his employment with Station WAUG, Raleigh, North Carolina should he be awarded the construction permit (Dawson Ex. 4).

Integration

46. Dawson proposes to serve as General Manager of the station devoting at least forty hours a week to the position. As General Manager, he will establish all station policies, including entertainment formats, advertising rates, budgets, and size of staff. He will also make all personnel decisions, including hiring, firing, salaries and promotions. He will obtain financing for the station and supervise the station's finances. Dawson will supervise the day-to-day operation of the station, including advertising sales, promotion, accounting, and programming. He will supervise and direct all station employees and will assign their duties on a daily basis (Dawson Ex. 3).

47. Dawson is Black (Dawson Ex. 2). He currently resides in Raleigh, North Carolina. He has lived within the city limits of Raleigh since the Spring of 1983. From January of 1982 until approximately May of 1983, Dawson lived in Cary, North Carolina, a suburb of Raleigh, which is located within the 1 mV/m contour of his proposed station. Prior to January, 1982, Dawson lived outside of the proposed service area (Dawson Ex. 2; Tr. 580).

48. Dawson is a volunteer with the American Cancer Society, Wake County Unit. He has been involved with this organization since April of 1987. He is presently serving a two-year term on the twelve member Board of Directors and attends meetings at least once a month. He also serves on the Public Information Committee and has recently been appointed to the Minority Marketing Committee. In 1988, Dawson helped organize and was co-chairman of a golf tournament, which raised funds for the society (Dawson Ex. 2). Dawson has helped organize and directly participated in Operation Harvest for the past two years. This activity is basically a food drive (Dawson Ex. 2; Tr. 669-671). Operation Harvest is an annual event sponsored by station WAUG. WAUG does a remote broadcast which encourages listeners and passerbys to donate canned goods to needy families (Dawson Ex. 2). Dawson devoted approximately thirty-six to forty hours to this event in 1987, and approximately thirty to thirty-five hours to this event in 1988 (Tr. 670-671).

49. Dawson is currently employed as Senior Account Executive at standard broadcast station WAUG, Raleigh, North Carolina, licensed to St. Augustine's College (Dawson Ex. 2; Tr. 772). Dawson has held this position since June of 1987. Station WAUG is operated as a commercial business and is run by a professional staff. Dawson sells advertising to local and regional accounts (Dawson Ex. 2). Dawson has a one year contract with the radio station but claims that he may terminate his contract at any time, with thirty days notice (Tr. 647-649).

50. From January of 1986 to June of 1987, Dawson was employed as an Account Executive with stations WKIX(AM)/WLYT(FM), Raleigh, North Carolina. Prior to this position, Dawson was an account executive with standard broadcast station WSES, Raleigh, North Carolina, from April of 1985 until January of 1986. Within one month of taking the position at WSES, Dawson was promoted to acting Sales/Station Manager. From October of 1981 to April of 1985, Dawson was employed by *The Carolinian*, a weekly Raleigh newspaper, and licensee of standard broadcast station WLLE in Raleigh. Dawson sold advertising and reported on sports events for both the newspaper and the radio station (Dawson Ex. 2).

51. While in college, Dawson worked, on a voluntary basis, in a non-salaried position at standard broadcast station WDUR, Durham, North Carolina. He wrote and reported news and sports programs on the weekends, and was responsible for initiating a public affairs program entitled "Street Life." His volunteer work at WDUR continued for a three year period. (*Id.*)

Auxiliary Power

52. Dawson proposes to install auxiliary power generators at both his studio and his transmitter facilities, in order to permit continued operation of the station in the event of an interruption in power supply (Dawson Ex. 5).

Dawson's Financial Qualifications

53. With respect to the costs of prosecuting his application, Dawson has entered into a contingency arrangement with his counsel providing for payment to counsel only if Dawson's application is granted or the case is settled. Dawson has entered into a similar arrangement with his consulting engineer (Peebles Ex. 6; Tr. 617-619, 621, 656, 678). Assuming Dawson's application is granted, payment would not be required until after the station has been in operation for three years (Tr. 625, 809). The three year time period was established to permit the station to become profitable before payment begins (Tr. 809). Under the contingency fee arrangement with counsel, Dawson would be required to pay counsel 1/3 of the value of the radio station (Tr. 808). Counsel will take care of payments to the engineer (Tr. 821). Dawson intends to take out a bank loan to pay counsel. If he is unable to get a loan, Dawson and his counsel would work out terms for repayment. Dawson has a verbal assurance from his counsel that he would not have to sell the station to pay counsel (Tr. 809-810, 820-821). Dawson intends to retain the station for many years, eventually passing it on to his son (Tr. 812, 821). The fee arrangement does not give either counsel or the consulting engineer any control, interest or equity in the station (Tr. 623, 818). Counsel has also loaned Dawson $6,000 to pay his hearing fee. The loan is repayable by 1995 regardless of whether Dawson's application is successful (Tr. 645-646, 808).

54. In order to demonstrate that he will have adequate funds to construct his proposed station and operate it for three months, Dawson has obtained a letter from the Mechanics and Farmers Bank of Raleigh, North Carolina, dated December 1, 1988, agreeing to lend him $325,000 in the event his application is granted by the Commission (Dawson Ex. 1, p. 1). The letter provides that: (a) No repayments of principal would be required until the station has been in operation for at least six months; (b) the loan will be collateralized by assets of the station and other assets meeting the bank requirements; (c) the bank believes the assets of Dawson's proposed station and assets owned by Mary L. Whitley will be adequate collageral for the loan (Dawson Ex. 1, Att. A). By separate letter the bank informed Dawson that if the loan had been advanced in December of 1988, the interest rate on the loan would have been 11% (Tr. 847-848).

55. Mrs. Whitley is Dawson's mother-in-law. In the event his application is granted, she has agreed to help him in any way she can to secure funds to construct and operate the station. She has spoken with officials of the Farmers and Mechanics Bank concerning her intent to help Dawson and has agreed to pledge any and all of her assets as collateral for a loan to Dawson in an amount up to $325,000 and to personally guarantee such a loan if requested to do so. She has been a customer of the bank for many years. The bank is familiar with her financial affairs and has indicated that assets which she owns individually, together with the assets of the proposed radio station, would be sufficient collateral for the proposed loan (Dawson Ex. 1, Att. B). Dawson and Mrs. Whitley personally visited with Stanley Green, Senior Vice President of the bank and author of the letter to Dawson, and discussed obtaining the letter. In his discussion, Green indicated that the bank was familiar with Mrs. Whitley's assets and that those assets in conjunction with the assets of the station would be sufficient collateral for the proposed loan (Tr. 640-642, 792).

56. Dawson proposes to borrow the $325,000 from the bank two months before his station goes on the air. In accordance with the terms of the bank letter, he will be required to make monthly payments of interest only during those two months and during the first three months of operation. Assuming the 11% interest rate quoted by the bank, these payments will be $2979.17 per month (325,000 x 11 8 12), or $14,895.83 for the five months from the beginning of construction through the end of the first three months of operation (Dawson Ex. 1; Tr. 847-848). After subtracting these interest payments, Dawson will have available $310,104.17 from the bank with which to construct and operate his proposed station.

B - Projected Cost of Construction and Operation

57. Dawson estimates his construction cost as follows:[5]

Tower Erection Cost $125,000.00

(Estimate based on quote from PiRod, Inc. dated December 7, 1988, Dawson Ex. 1, Att.C).

Equipment Costs 89,637.25

(Estimate based on proposal from Varian Continental Electronics Division dated November 18, 1988, Dawson Ex. 1, Att. D. Certain items included in the Varian estimate will not be purchased by Dawson due to the nature of his construction plans; *e. g.*, since he will construct a self-supporting tower using the services of PiRod, he will not need the tower listed in the Varian proposal; and since he will use telephone lines to connect his studio and transmitter, he will not need STL equipment.

Auxiliary Power Generators 6,000.00

(Estimate based on contact with dealer, Tr. 633-634).

Equipment Installation Costs 10,000.00

(Estimate based on contact with consulting engineer; does not include cost of erecting tower or installing antenna and transmission line because those costs are included in the PiRod proposal, Dawson Ex. 1, Att. C).

Other Construction Costs (freight, 8,000.00

furniture, office equipment, etc.) Note: No legal costs will be payable until after the station has been in operation for more than three months. PBC Ex. 6, p.2.

Total Construction Costs $238,637.25

58. Dawson estimates his costs of operation for the two months preoperational period and the first three months of operation as follows:[6]

(a) Salaries

(Based on experience at radio stations in Raleigh, Tr. 632).

General Manager (Bernard Dawson) $3,000.00

($750/month for 4 months)

Sales Manager 4,200.00

($1,200/month plus commissions - 3.5 months)

Program Director/News Director / Announcer 4,500.00

($1,500/month for 3 months; this individual will also serve as an announcer/operator from 6:00 a.m to 10:00 a.m., Monday-Saturday)

Secretary / Traffic / Receptionist / Bookkeeper 2,600.00

($200/week for 13 weeks)

Full - Time Announcer 3,900.00

($300/week for 13 weeks; this individual will serve as an announcer/operator from 10:00 a.m. to 5:00 p.m., Monday-Saturday)

Part - time Announcers / Operator 4,680.00

(4 more individuals will be hired at $6/hour to operate station from 5:00 p.m. to midnight, Monday-Saturday, and from 6:00 a.m. to midnight on Sunday, or a total of 60 hours/week, 13 weeks)

Total Salaries $ 22,880.00

(b) Other Operating Costs

Payroll Taxes (7.51% of $22,880.00) $ 1,712.28

Transmitter Site Rental 4,166.66

(Based on estimate from land owner, $833.33/month for 5 months)

Studio Rental 4,000.00

(Based on investigation of suitable storefronts; $1,000/month for 4 months Tr. 635)

Utilities 3,500.00

(Based on power, heat, telephone lines and telephone service at $1,000/month for 3.5 months, per knowledge of similar operations. Tr. 636)

Contract Engineer 1,200.00

(Based on prevailing rates in market; 3 months at $400/month. Tr. 824)

Office Supplies and Postage 262.50

(Based on 3.5 months at $75/month)

Insurance 1,200.00

(Based on knowledge of similar operations; liability, property, workmen's comp.; $300/month for 4 months. Tr. 637)

Records and Tapes 1,150.00

(Based on knowledge of similar operations; $1,000 for initial purchase and $50/month for 3 months. Tr. 638)

Total Other Operatings Costs $ 17,191.44

59. In summary, Dawson projects his total construction and operating costs to be $278,708.69.[7] He will have available $310,104.07 from the Mechanics and Farmer Bank to pay these costs, leaving a "cushion" of $31,395.48 with which to meet any unanticipated construction and operating costs (Dawson Ex. 1, p. 1).

CONCLUSIONS

Basic Issue

Financial Qualifications - Dawson

60. Dawson has demonstrated that he will have available $310,104.17, after subtracting interest payments due though the conclusion of 3 months of operation, with which to construct and operate his proposed station for 3 months. This money will come from the Mechanics and Farmer's Bank of Raleigh which has provided him with a loan letter meeting the Commission's "reasonable assurance" standard for the availability of funds. The amount of the loan, the terms of repayment, the rate of interest to be charged, and the collateral which will be required have been described by the bank, and Mary L. Whitley, the person whose name is mentioned in the letter as possessing adequate collateral to secure the loan, has indicated her agreement to do so. Thus, Dawson has demonstrated the availability of these funds. *Poet's Seat Broadcasting, Inc.*, 47 RR 2d 1265, 1271, 78 FCC 2d 1080, 1088 (Rev. Bd. 1980); *New Continental Broadcasting Co.*, 50 RR 2d 1117, 1123 (Rev. Bd. 1981); citing *Jay Sadow*, 39 FCC 2d 808, 26 RR 2d 1032 (Rev. Bd. 1973); *Las Vegas Valley Broadcasting Co.*, v. *FCC*, 589 F.2d 594, 44 RR 2d 683 (D.C. Cir. 1978).

61. Moreover, Dawson has provided reasonable estimates that his construction and operation costs would be about $278,708.69, leaving him a "cushion" of more than $31,000 from which any unanticipated costs could be met. As an experienced broadcaster, his estimates are entitled to weight. *K-Smith Enterprises*, 56 RR 2d 252, 255 (Rev. Bd. 1984). In order to prevail on the financial issue, Dawson's opponents would be required to show that his cost estimates "are so far below average or beyond a range of reasonableness as to lead to a conclusion that he could not construct and operate the station as proposed." *Id.*, citing *Thunder Bay Broadcasting Co.*, 49 FCC 2d 1023, 1028, 31 RR 2d 1569, 1576 (1974). No such showing was even attempted by the other applicants in this proceeding. Accordingly, it must be concluded that Dawson is financially qualified to construct and operate his proposed station and Issue No. 1 must be resolved in his favor.

Comparative Issue

Diversification

62. All the applicants, with the exception of Clear, have no attributable media interests. Clear, the licensee of numerous broadcast stations, receives a substantial diversi-

fication demerit. Peebles and Free Air contend that a diversification demerit should be assigned against Intermedia because of Lee's association with North State Public Video and Africa News. However, it is clear that the production of programming is not considered under the diversification criterion unless there is a showing that such interest undermines the objectives underlying the principles of diversification of control of mass media interests. *See Morris, Pierce and Pierce*, 50 RR 2d 959 (Rev. Bd. 1981). No such showing has been made in this case. In this connection, as pointed out by Intermedia in its Reply, there has been no showing that a single program from either organization will be broadcast in the Raleigh area, effecting a reduction in diversity of viewpoints or causing concentration of control. Therefore, no diversification demerit is warranted.

Integration

63. Malloy, an individual applicant who proposes to work full-time as General Manager receive 100% integration credit. Free Air and Peebles contend that Malloy is entitled to no integration credit because his father, a 75 year old retired doctor (Tr. 164-165), has loaned and made gifts of money which Malloy has used in prosecuting his application. The contention is rejected. There is no FCC policy barring parents from giving their children financial support to apply for and operate broadcast stations. *See Tuscarawas Broadcasting Co.*, 4 FCC 2d 466 (Rev. Bd. 1966). A family member who helps finance an application does not become a real party-in-interest unless that person's intent to exercise control over operations of the, proposed facility is demonstrated. *Virginia Communications, Inc.*, 2 FCC Rcd. 1895 (1985). The record makes clear that Malloy's father's willingness to loan his son money in connection with the application relates solely to the familial relationship which exists between them (Tr. 159-160). Malloy is the sole and dominating force behind the application[8] and the elder Malloy will not be involved in the management or operation of the radio station in any way (Tr. 161-165). There is no record evidence justifying denial or diminishment of Malloy's quantitative credit. Malloy receives minority enhancement credit and slight enhancement for Malloy's proposal to move to the community of license. Malloy receives no civic participation enhancement for his short-lived participation in a civil rights demonstration held in Raleigh in the early 1960's. The activity is too remote in time to rely on to provide knowledge of the current needs and interests of the Raleigh community. Malloy also receives slight broadcast experience enhancement.

64. Peebles receives 100% quantitative credit. The record establishes that Peebles is a *bona fide* two tiered corporate entity and its sole non-voting shareholder is fully insulated from involvement in corporate affairs and will be insulated from management and operation of the proposed station. Competing applicants urge that Peebles' corporate structure is too inchoate to be credible and that Inez Peebles is not truly insulated from corporate affairs. Neither argument has any merit.

65. The fact that close scrutiny of Peebles' legal structure reveals some informalities, does not warrant discrediting the *bona fides* of its two-tiered corporate structure. *See Victory Media, Inc.*, 3 FCC Rcd 2073, 64 RR 2d 1290 (1988); *Coast TV*, 4 FCC Rcd. 1786 (1989). Moreover, uncontroverted testimony by both principals of Peebles demonstrates that they have contributed funds to the applicant in an amount sufficient to pay for their stock and then some. The test by which Peebles' integration proposal must be judged, is that articulated in *Bradley, Hand and Triplett*, 89 FCC 2d 657, 662, 51 RR 2d 383 (Rev. Bd. 1982):

> "Where an applicant sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out, we will credit that proposal."

Peebles' intention to have two classes of stock, voting and non-voting, and to integrate its sole voting stockholder, Mr. Peebles, into the management and operation of the proposed station is clear and uncontroverted on the record, and contemporaneous public documents filed with the State of North Carolina and the FCC corroborate Peebles' proposal. Moreover, the testimony is unequivocal that Mr. Peebles has been in control of the applicant from the outset and that Inez Peebles has been, at all times, a mere passive investor. In this connection, there is no evidence in the record showing that Inez Peebles has participated in the preparation or prosecution of the application or, if the application is successful that she will participate in any way in the operation and management of the broadcast station. Her testimony as to her "passive" involvement has not been challenged.[9] Therefore, award of one hundred percent quantitative integration credit to Peebles is warranted.

66. Peebles receives minority enhancement credit. Peebles' integration proposal is greatly enhanced by Mr. Peebles' long term residence in the community of license. *See Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264 (Rev. Bd. 1984). Mr. Peebles has lived in Raleigh for most of his life (1958 to the present) with the exception of four years when he was away at college between 1976 and 1980, and approximately a two year period between 1981 and 1983. Mr. Peebles' integration proposal is also enhanced by his participation in civic affairs in Raleigh and by his past broadcast experience.

67. Interactive receives 100% quantitative credit for the proposed participation of its two general partners in full-time management positions. Interactive's opponents contend that integration credit should not be awarded because Interactive's general partnership agreement is oral. They urge that a written partnership agreement is a prerequisite to the award of integration credit, citing *Payne Communications, Inc.*, 1 FCC Rcd. 1052 (Rev. Bd. 1986) and *Pacific Television, Ltd.*, 2 FCC Rcd. 1101 (Rev. Bd. 1987). However, they ignore the Commission's recent holding in *Coast TV*, *supra* that an oral agreement, at least with respect to "single tier" applicants, does not bar the award of integration credit. *Coast TV* involved an unincorporated association of three persons who stated in their application that they intended to form a corporation but did not do so until well after the B cut off date. The Review Board awarded no integration credit holding that an oral unincorporated assocation was too tenuous an organizational structure. In reversing the Board, the Commission stated:

> [u]nder established Commission precedent, integration credit is warranted where a specific integration proposal is set forth, the applicant adheres to it, and there is a reasonable assurance that it will be carried out.

Id. at 1789, *citing, Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 n.6 (1965); *Bradley, Hand & Triplett*, 89 FCC 2d 658, 662 ¶ 8 (Rev. Bd. 1982).

Thus, integration analysis --- at least for "single-tier" applicants --- now focuses on the stability of the integration proposal and the likelihood of its effectuation --- *not* on whether the basis of the applicant's business entity is a written or oral agreement among its principals. The clear holding of *Coast TV* is, therefore, that Review Board decisions denying credit to "an oral general partnership," *Payne Communications ; Pacific Television, Ltd., supra*, are no longer good law. Here, the evidence establishes that Interactives's two principals, as specified in its application, stayed the same and that their representations to be fully integrated in the management of the station remains steadfast. There is no reason to believe that Lee and Baker will not carry out their integration pledges if Interactive is given a grant. Consistent with *Coast TV*, Interactive receives 100% quantitative credit.

68. Interactive receives 100% minority enhancement for the proposed participation of Lee and Baker. Interactive receives slight local residence credit for Lee's past residence in Raleigh while attending college and the proposal of Lee and Baker to move to Raleigh if their application is granted. Interactive also receives credit for Lee's and Baker's participation in Raleigh area civic activities. Interactive also receives slight enhancement for the past broadcast experience of its principals.

69. Free Air and Clear Channel are not proposing to integrate any of its principals into the management and operation of the proposed station. Therefore, Free Air and Clear Channel receive no integration credit.

70. Dawson receives 100% quantitative credit for his proposal to serve full-time as general manager of the station. Dawson's opponents argue that the contingency fee arrangement between Dawson and his counsel somehow makes counsel a principal or a real party-in-interest to the Dawson application. These arguments are not supported by facts established on the record or by apposite precedent. To this Presiding Judge's knowledge, there is no Commission policy barring contingent fee arrangements such as the one entered into between Dawson and his counsel. In this connection, the fee arrangement does not give counsel any control, interest or equity in the proposed station. Moreover, there is nothing in the record which indicates that the services rendered by counsel are the least bit unusual or that they differ materially from the services rendered by other counsel to their clients in this proceeding.

71. Dawson receives 100% minority enhancement. Dawson's integration proposal is also enhanced by his five year residence within the city of Raleigh and his one year residence in Cary, a suburb of Raleigh. Dawson receives only a very slight enhancement for his participation in civic activities. He did not become involved with the American Cancer Society until one year after he filed his application, and his involvement with Operation Harvest did not begin until two years after he filed his application. Moreover, his involvement with Operation Harvest is connected with his employment at WAUG. *See Jarad Broadcasting Company, Inc.*, 61 RR 2d 389 (Rev. Bd. 1986); *MTF Enterprises*, 99 FCC 2d 297, 56 RR 2d 1451 (Rev. Bd. 1984). Dawson also receives enhancement for his past broadcast experience.

72. *Integration Summary* - Malloy, Peebles, Interactive and Dawson receive 100% quantitative credit. Free Air and Clear Channel receive no integration credit. Since the above four applicants are equal on quantitative grounds, the award of an integration preference turns on their respective qualitative attributes. Local residence and minority integration preference have equal comparative significance in choosing the comparatively superior applicant. *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-946 (1985). Malloy, Peebles, Interactive and Dawson are equal under the minority enhancement factor and no minority preference is warranted. However, Peebles is superior to the other applicants under the local residence factor. As between Peebles and Dawson, Peebles is a lifelong resident of Raleigh with the exception of his absence from the city to attend college and a 2 year period when he held a broadcast position outside of the city. Dawson, by contrast, has lived in the service area only since January 1982, four years before filing his application. Peebles therefore receives a moderate local residence preference over Dawson, its closest competitor. *See Vacationland Broadcasting Company, Inc.*, 97 FCC 2d 488, 496 (Rev. Bd. 1984); *Minority Broadcasting, supra* ; *see also Marlin Broadcasting of Central Florida, Inc.*, FCC 89R-62, released November 13, 1989 (Rev. Bd.), paragraph 47. Peebles' integration preference is even greater when its local residence showing is weighed against that of Interactive and Malloy. Peebles' civic participation is also superior to that of Dawson and Interactive. Malloy has received no enhancement credit for civic participation. In addition, Peebles' past broadcast experience is equal to that of Dawson and Malloy and superior to that of Interactive. Peebles therefore receives a moderate "overall" integration preference over Dawson and a moderate to substantial preference over Interactive and Malloy. Dawson is ranked second, Interactive third and Malloy, fourth.

Auxiliary Power

73. With the exception of Clear Channel, the applicants all propose auxiliary power. All receive an auxiliary power preference over Clear Channel.

Final Comparative Evaluation

74. Peebles receives the construction permit. Peebles suffers no diversification demerit and, for the reasons stated in paragraph 72, *supra*, receives an integration preference over the competing applicants. The grant of Peebles' application will best serve the public interest. Acccordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[10] the application of Peebles Broadcasting Company for a construction permit for a new FM station on Channel 275A in Raleigh, North Carolina IS GRANTED; and the applications of Henry R. Malloy, Jr. d/b/a Rem Malloy Broadcasting, James S. Lee and Donald L. Baker d/b/a Interactive Media, Free Air Corporation, Clear Channel Communications, Inc., and Bernard Dawson ARE DENIED.

Federal Communications Commission

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Raleigh FM Limited Partnership, FM Carolina, Inc. and BCB Enterprises failed to file Notices of Appearance as required by 47 CFR 1.221(c). Holy Spirit FM Limited Partnership's application was dismissed voluntarily at the request of the applicant. *See Order*, FCC 88M-4013, released November 23, 1988.

[2] The "Five-Year Plan" was given to a Durham banker prior to the time the Interactive Media Application was filed. *Id.*

[3] Lee was an undergraduate at North Carolina State University between 1957 and 1960. He lived on and off campus. His family residence was in Durham (Tr. 410-411). Lee also lived in Raleigh from 1965 to 1970. At the time, he was completing his undergraduate degree and beginning work on his masters at North Carolina State University. Lee was then married and lived in a private residence in Raleigh (Tr 412-413).

[4] Official notice is taken of a change in call letters from KDTU(TV) to KTTU-TV, effective April 1, 1989.

[5] Dawson Ex. 1, p. 1.

[6] Dawson Ex. 1, pp. 2-3.

[7] As discussed, *supra*, Dawson's costs for prosecuting his application will not have to be paid until after station has been in operation for three years.

[8] Malloy's Reply filed May 12, 1989 details Malloy's involvement in the preparation and prosecution of the application. *See* pages 5-7. Also contrary to Peebles' assertions Malloy has contributed a substantial amount of his own funds in pursuit of the application (Tr. 126, 132, 148).

[9] The typical situation challenging integration credit in a two tiered entity is that the "passive" participant has been too active. Here the charge is that Ms. Peebles has been too passive. Thus, Interactive claims that Ms. Peebles cannot be deemed to be properly insulated because she did not read the corporate documents containing insulation provisions. However, while Mr. Peebles may not have read the corporate documents to Ms. Peebles, he did discuss with her the formation of the corporation and his control over it (Tr. 204, 206). Moreover, Ms. Peebles testified that she and Mr. Peelbes discussed the two classes of stock, which class of stock each would own, and that she would have no voting rights (Tr. 333). Ms. Peebles further testified that she never intended to be involved in the management and operation of the station and that this venture was "merely an investment" for her (Tr. 328). The best proof that Ms. Peebles intends to be a "passive" participant is that the opponents of Peebles can not point to a single thing she has done on behalf of the applicant.

[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-308

In re Applications of

REAL LIFE EDUCATIONAL FOUNDATION OF BATON ROUGE, INC. — File No. BPED-840322CA

JIMMY SWAGGART MINISTRIES — File No. BPED-840822IF

For Construction Permit for a New Noncommercial Educational Broadcast Station, Channel 203C2, in Baton Rouge, Louisiana

Appearances

James J. Popham, Esq. on behalf of Real Life Educational Foundation of Baton Rouge, Inc.; *Eric L. Bernthal, Esq., Everett C. Johnson, Esq., Michele Brown, Esq.* on behalf of Jimmy Swaggart Ministries, Inc.; and *Charles E. Dziedzic, Esq.* and *Y. Paulette Laden, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: November 22, 1989; Released: December 5, 1989

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of the two remaining applicants in this case: Real Life Educational Foundation of Baton Rouge, Inc. ("Real Life") and Jimmy Swaggart Ministries ("JSM") for a construction permit for a new non-commercial educational broadcast station on Channel 203C2 at Baton Rouge, LA. This was initially a three party case designated for hearing under *Hearing Designation Order* DA 88-916 (" *HDO* "), 3 F.C.C. Rcd 4359, released July 20, 1988, and published at 53 Fed. Reg. 28267 (July 27, 1988).[1]

2. The following issues which were set under the *HDO* remain to be decided:

> 1. To determine (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
>
> 2. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

See HDO at Para. 12. It was contemplated by the Bureau that evidence on comparative coverage would be taken and that such evidence adduced would be limited to available noncommercial educational FM signals within the respective service areas. *HDO* at Para. 10.

3. The Hearing in this case was set for January 23, 1989. *See Order*, FCC 88M-3187, released September 27, 1988. Under *Order*, FCC 88M-4223, released December 9, 1988, the procedural dates were modified, extending the discovery cut-off date and setting the direct case exhibit exchange to January 9, 1989. But the hearing date remained the same. The parties have not agreed to a share-time arrangement and both parties contend that one would not be feasible. Therefore, litigation was necessary to resolve the case. An admissions session was conducted on January 23, 1989, and hearings were held on January 24 and 25, 1989, in Washington, D.C. At the close of the evidentiary session, Findings of Fact and Conclusions of Law were set to be filed on March 6, 1989, with Reply Findings due on April 7, 1989. All parties made timely filings and corrections to the record have been effected. *See Order*, FCC 89M-710, released March 3, 1989.

4. There are no qualifying issues to consider. Therefore, this decision will consider only the comparative issues and the feasibility *vel non* of a share-time arrangement in accordance with the Commission's standards at 47 C.F.R. §1.267(b) (initial decision to include findings of fact and conclusions of law as well as reasons or basis therefore). The burdens of proof on the issues are with the respective parties. This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C.A §§551 *et seq.*] and the preponderance of the evidence standard applies. *Steadman* v. *S. E. C.*, 450 U.S. 91, 101 S.Ct. 999, 1007 (1981). Testimony is cited where practicable by the name of the witness followed by the transcript page number, *e.g.*, "Smith, Tr. 0001." References to Proposed Findings of Fact and Conclusions of Law are designated "PFC" and references to Reply Findings and Conclusions are designated "RPFC."

FINDINGS OF FACT

5. Since the applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F. C. C.*, 325 U.S. 327, 333 (1945). 47 U.S.C. §309. Rather than the criteria established for commercial comparative hearings,[2] the standard noncommercial comparative issue applies here (assuming no share-time arrangement) which is an inquiry to determine: (A) which applicant will best integrate the operation of the proposed station into the overall educational and cultural objectives of the applicant, *New York University*, 10 Radio Reg. 2d (P&F) 215 (Comm'n 1967); (B) the manner in which the proposed operation of the competing applicants will meet the needs of the community to be served, *Pacifica Foundation*, 21 F.C.C. 2d 216 (Review Bd 1970); and (C) whether "other

factors" in the record demonstrate that one applicant will provide a superior noncommercial radio broadcast service, *New York University, supra*. The Presiding Judge must also determine *sua sponte* whether the preponderance of the evidence supports the imposition of a share-time arrangement.

COMPARATIVE ISSUES

Comparative Coverage

6. Under the comparative issues set in the *HDO*, the parties were required to submit comparative coverage evidence in a joint exhibit in order to permit consideration of the areas and populations within the respective Grade B contours and the availability of other primary aural noncommercial services of Grade B or greater intensity. But as indicated above, the evidence adduced under this issue will be limited to available noncommercial educational FM signals. *New York University, supra*.

7. The following table reflects the total areas and populations within each applicant's proposed 1 mV/m contour.

Applicant	*Area* (sq. km)	*Population*
Real Life	1,789	423,392
JSM	1,868	423,416

The following table reflects the number of other existing noncommercial educational FM services available in the uncommon areas.

	Real Life		*JSM*	
No. of Services	*Area* (sq. km.)	*Population*	*Area* (sq. km.)	*Population*
0	-	-	-	-
1	58	7,211	443	29,578
2	83	11,617	-	-
3	75	7,838	-	-
4	148	2,888	-	-
5 or more	-	-	-	-
TOTAL	364	29,554	443	29,578

(Joint Exh. No. 1 - Engineering Exhibit; Tr. 27-28.) This evidence supports a finding that JSM will provide a second noncommercial gray area service to approximately 22,000 more persons than will Real Life.

REAL LIFE'S PROPOSAL

Organization

8. Real Life is a non-profit corporation that was organized on March 5, 1984 under the laws of the State of Louisiana. (RL Exh. 1.) It was organized for charitable, religious, educational and scientific purposes, including the initiation, promotion, encouragement, and support of educational research with special emphasis on teaching techniques in the field of education and communication. (RL Exh. 2 at 1.)

9. Real Life's assets, affairs and activities are controlled by a board of directors. (*Id.*) As a non-stock corporation, Real Life has "participating members" who would be entitled to one vote in the election of directors, and in any other matters which require membership notes. However, by resolution of the board of directors on March 5, 1984, the "members" would be limited to the members of the board of directors who would exercise all rights and powers. (RL Exh. 1 at 2.) Such a structure is found to constitute a self-perpetuating governing board.

10. There are now seven directors of Real Life, three of whom are officers: Danny M. Dean is president; Dorothy D. Garlow is secretary; and Earl Francis Rolling, Jr. is treasurer. Dean has been authorized by the board of directors to take all actions necessary to prosecute Real Life's application. (*Id.*) It was Dean who developed the idea to organize Real Life and to apply for the noncommercial FM station in Baton Rouge. (Dean, Tr. 110.) Dean, Garlow and Rolling are proposed to be integrated into management.

Real Life's Educational Objectives

11. As found above, Real Life's stated corporate purposes is to initiate, promote, encourage and support educational research with "special emphasis on teaching techniques in the filed of education and communication." (RL Exh. 2 at 1.) In furtherance of that purpose, Real Life proposes to construct and operate an educational radio station in Baton Rouge. (Dean, Tr. 131.) The purpose of the station is to provide an educational broadcast service to Baton Rouge and nearby communities that are located within its proposed service area. A related purpose is to encourage and promote educational opportunities in those communities. (RL Exh. 2 at 1.) There is no evidence offered of any alternative ,projects and goals for Real Life if it is not awarded the construction permit. Thus, it is found that Real Life's only means to fulfill its stated educational objective is through the Baton Rouge radio station that is at issue here. Also, there is no evidence of Real Life having any cultural objective and therefore none is found.

Community Need As Ascertained By Real Life

12. Real Life relies on Dean's experience as a broadcaster in the community as the sole resource for determining Baton Rouge's needs for "instructional radio programming." (Real Life's PFC at 6.) Dean is general manager of noncommercial FM Station WBRN in Baton Rouge where he has worked for ten years. There is no evidence offered by Real Life that Dean contacted various segments of the community to ascertain community needs and interests. Real Life describes what Dean did:

> He [Dean] listens to other noncommercial stations serving Baton Rouge (KLSU, WBRN, WRKF) and has consulted with their management to determine their interest in providing instructional programming. [Citation omitted.] He also is a student at Louisiana State University ("LSU"), licensee of KLSU, and has consulted with Ben Simon, the person in charge of the telecourse division, and Dr. Fritz McCameron, the Dean of Continuing Education.

(Real Life PFC at 6-7.) That statement describes in full the steps taken by Dean to ascertain educational needs and interests. This evidence does not establish any substantial effort on the part of Real Life to ascertain the educational needs or interests of the Baton Rouge community. Also, the hearsay testimony of Dean concerning the conversations that Dean had with Mr. Simon and Dean McCameron, and the fact that neither Simon nor McCameron were produced as witness, render the account less reliable.[3]

13. Subject to the foregoing comment on the quality of the evidence on which Real Life relies,[4] Dean's uncontroverted testimony establishes that Mr. Simon and Dean "expressed interest (the extent of that interest being unclear from the evidence) in LSU's offering credit courses on Real Life's proposed station." (Real Life PFC at 7; Dean Tr. 96.)

14. Specifically, Dr. McCameron testified in an untested sworn written statement that he is Dean of Continuing Education at LSU which presently offers "telecourses" for credit through the facilities of noncommercial TV Station WLPB-TV, Baton Rouge. Dr. McCameron testified that he is familiar with Real Life's proposal for instructional programming. He further testified through his signed statement:

> He [Dr. McCameron] considers this a valuable opportunity for LSU to provide additional instructional programming to its students and residents in the Baton Rouge area. Dr. McCameron will work with Real Life to select courses to be offered on Real Life's station. Subject to the approval of the LSU administration and coordination of courses with various academic departments at LSU, LSU will offer instructional course for credit on Real Life's proposed FM station in Baton Rouge.

(RL Exh. 18.) This evidence establishes that LSU, through Dr. McCameron, would be interested in working with Real Life to develop and offer presently undefined instructional materials which, only if later acceptable to Dr. McCameron and to the LSU administration, would be offered to LSU students in an undefined radio program format. There is no evidence that LSU, which uses "telecourses" broadcast over a TV station, has any expertise in developing instructional courses in a radio format. Nor does Real Life offer evidence on how it could bring such expertise to the enterprise. It is established, however, that LSU never has offered credit courses on the radio. (Dean, Tr. 155.)

15. Real Life asserts that the availability of credit courses through radio programming would be useful for persons who cannot attend classes. Such persons would include those that work 12 hour days for five days each week and for those who are severely handicapped and unable, without great personal difficulty, to attend classes personally. (Real Life PFC at 8.) Also, persons who are blind would benefit from such programming, and Real Life has introduced evidence which indicates that there are 948 "blind and print handicapped persons" in the East Baton Rouge Parish where the City of Baton Rouge is located. (RL Exh. 11.) In addition to audio courses, Real Life will offer a one-hour Sunday program of inspirational Bible readings for the blind. (*Id.*)

16. The unquantified benefit of such programming is self-evident in that there would be some indeterminate number of persons who would not otherwise receive educational instruction. But the significance of radio broadcast academic instruction to the community cannot be determined from the evidence upon which Real Life relies. There has been no model prepared of the range of radio courses that LSU would be prepared to produce (or co- produce) and sponsor. Such a model, or suggested model of programs, could be used to survey the community to determine interests. The results of such a survey would be meaningful. But none was done. Also, there has been no coordination with LSU's TV resource to consider a simulcast which could enable persons with sight to receive visual as well as aural instruction thereby providing the optimal service. Such coordination probably would be undertaken by LSU before it would turn the programming over to Real Life. Nor is it clear how much content control would be retained by LSU thereby making it impossible now to determine who ultimately will be responsible for programming. Nor has there been any actual or proxy ascertainment made of how many (or what percentage of persons in the community) would enroll in an over-all academic program that would award a certificate or degree in a disciplined course of study that would include some percentage of radio instruction for credit. The fact established by Real Life's evidence that no instructional programming is available on radio in Baton Rouge is also probative of there being an insufficient interest in such radio instruction. (Dean, Tr. 98-99, 109.) There is nothing in the evidence which suggests that LSU would award a degree or a certificate based on a course that was exclusively conducted *via* radio broadcasting. Therefore, the concept proposed by Real Life remains only a dormant idea that needs considerable work and coordination with LSU experts before it can be assessed as an educational program that would meet Baton Rouge's educational needs or interests. Even the Bible readings for the blind could be made available to the blind population on a TV program that was intended to reach *all* segments of the population, including *all* of the handicapped and bedridden.

Real Life's Specified Programming

17. Real Life proposes to broadcast 24 hours daily for 7 days each week, with specific programs allotted to time slots around-the-clock. (JSM Exh. 5 [Real Life Form 340].) Real Life has formulated specific programming which would supplement or compliment the instructional programming described above. It will introduce light entertainment programming called "Christian rock music" that Real Life states is designed to attract a large audience. (RL Exh. 3: Dean, Tr. 135.)

18. Real Life's instructional programming is defined as "courses offered for college or high school credit or for use in classroom instruction."[5] (Real Life PFC at 8.) From 9 a.m. until 2 p.m., Monday through Friday, Real Life proposes to offer such instructional programs under the program title "Radio School Of The Air." (RL Exh. 3.) But the instructional programs will not all be produced by Real Life or in conjunction with LSU. Real Life will broadcast instructional programs from a variety of sources[6] such as National Public Radio, the Corporation For Public Broadcasting and the Moody Bible Institute. (RL Exh. 3; Dean, Tr. 167; Real Life PFC at 9.)

19. To supplement the programming, students will be furnished with textbooks, study guides and other instructional materials and "usually" they will be required to attend an "initial class meeting." (Real Life PFC at 9.) Classes are otherwise taught over-the-radio, except for mid-term and final examinations. (*Id.*) There is no explanation offered, however, as to how the handicapped are to be accommodated with respect to attending the first class and the exams. In view of the weight placed by Real Life on providing an instructional program for those that are unable to attend classes (Paras. 15 to 16, *supra*), this failure further weakens the probability of Real Life's proposal.

20. Real Life has offered to make time available to educational institutions other than LSU for the broadcast of credit courses, and Real Life will broadcast announcements about local educational opportunities and facilities. (RL Exh. 3 at 2.) Real Life also will broadcast news and public affairs programs[7] and programs which Real Life proposes as "general education programs" which are "educational programs of more general interest, not offered for academic credit.[8] (RL Exh. 3 at 2, 3-6, Real Life PFC at 10.) Also, Real Life will broadcast at various times of the day and night two-minute local news and weather programs; three minute local news, traffic and weather programs at specific times; and five minute IMS network newscasts at specified times. A Community Billboard program will be broadcast for five minutes each day.

Real Life's Related Educational Activities

21. Real Life also proposes to make its broadcast facilities available to all local high schools and colleges as a "hands-on" training center for the students. A specially prepared, fully equipped control room will be included in the station's facilities for that purpose. Real Life proposes to make the control room available during the day for the students' instruction. Real Life proposes to provide the opportunity for these students to work at various phases of the station's operations, including program production. (RL Exh. 4.) However, there is no evidence concerning the identification or the qualifications of the person(s) who would be instructing these students. Thus, it is found to be a speculative proposal.

REAL LIFE'S OTHER FACTORS

Service To The Blind and Print Handicapped

22. The findings which are related to Real Life's proposed service to the blind and print handicapped set forth in Para. 15 above are incorporated here. Real Life will also offer one or both of its SCA subcarrier frequencies[9] for the service of broadcasting to the blind and print handicapped. (RL Exh. 11.) The SCA facilities would be made available to a Commission licensee, Radio for the Blind and Print Handicapped. That entity was formerly an applicant in this case. It offers a radio reading service over WRBH, a noncommercial educational FM broadcast station licensed to New Orleans. Real Life would permit use of its SCA facilities to provide the same service in Baton Rouge. There will be no adverse inference drawn against Radio for the Blind and Print Handicapped by virtue of its voluntary withdrawal from this case. This phase of Real Life's proposal will be considered.

Directors' Involvement In Operations

23. While in noncommercial comparative cases there is no comparative credit awarded for the quantitative integration of principals into management, the qualifications of those who are proposed to operate the station and particularly their broadcast experience, is probative of whether the proposed broadcasting is likely to succeed. Therefore, the evidence of the background of Real Life's three integrated directors is deemed to be relevant, qualitatively, to the comparative issue.

Danny M. Dean (" Dean ")

24. Dean will serve as general manager of the station. He will have ultimate responsibility for all decisions and policies at the station, subject to the authority of the board of directors, and he will supervise directly or indirectly all station employees. He will work at the station at least five days per week for a minimum of 40 hours per week. (RL Exh. 5 at 1.) In the event Real Life's application is granted, Dean will resign from his current position as general manager of WBRH and terminate his employment relationship with WBRH. But he may continue as a consultant to WBRH on a limited time basis were he has been employed since 1978. (RL Exh. 6 at 1- 2.) Dean also will resign his current positions as production director at KQXL-FM and traffic reporter for the Metro Information Service. (*Id.*)

25. Dean has resided in Baton Rouge, Louisiana, for twenty five years. He temporarily resided outside of Baton Rouge twice for periods of a semester while attending college at Southeastern Louisiana University in Hammond, and Louisiana College in Pineville, Louisiana. Dean expected to graduate from LSU in Baton Rouge in August, 1989, and he anticipated receiving a Bachelors Degree in General Studies with concentrations in speech and English. (RL Exh. 6 at 1; Tr. 174.)[10]

26. Mr. Dean has been employed by the following broadcast stations: (a) WBRH, Baton Rouge, Louisiana (1978-present)-general manager, program director, and announcer; (b) KSMI-FM/KKAY(AM), Donaldsonville, Louisiana (1979-1982)-announcer and music director; (c) KSLU, Hammond, Louisiana (Spring, 1983)-announcer (fulfilling full radio scholarship); (d) Metro Information Service, Baton Rouge, Louisiana (August, 1985-present)-traffic reporter; and (e) KQXL-FM, New Roads, Louisiana (March, 1988-present)-production director. (RL Exh. 6 at 1.)

Dorothy D. Garlow (" Garlow ")

27. Garlow will serve as coordinator of educational instructional programming. She will be responsible for the station's educational and instructional programming and for coordinating the station's educational and instructional programming with local educational institutions. She will be responsible for determining the particular educational and instructional programs to be broadcast. (RL Exh. 5 at 1; Dean, Tr. 168; Garlow, Tr. 186.) She will report to the program director and she will supervise employees involved in the handling and production of educational and instructional programming. Mrs. Garlow will have the authority to hire and fire employees under her supervision. (RL Exh. 5 at 1; Tr. 201.) She also will supervise the station secretary-receptionist who will be responsible for most typing work at the station. (Garlow, Tr. 190, 192.) She will work five days per week

for a minimum of 40 hours per week at the station. (RL Exh. 5 at 1.) In the event that Real Life's application is granted Garlow will resign her current position as manager of Fonvilles Studio in order to work full-time at the station. (RL Exh. 8 at 1.)

28. Garlow has resided at her current address in Baton Rouge, Louisiana, for the past 25 years. She has lived in Baton Rouge continuously since age three, except for a two year period during her childhood and during her enrollment in college. (RL Exh. 8 at 1.) She presently is employed at Fonvilles Studio, a photography studio and gallery in Baton Rouge, Louisiana. (RL Exh. 8 at 1.) In January, 1989, she was in charge of the studio during the owner's temporary absence from Baton Rouge. (Garlow, Tr. 179.) Prior to working at the Fonvilles Studio, she was employed at a public relations firm involved in lobbying and polling. (Garlow, Tr. 181.)

Matthew Trent Tullos (" Tullos ")

29. Tullos will serve as Program Director of Real Life's station on a part-time basis. He will report to the general manager and supervise all employees involved in programming (other than educational and instructional programming). Tullos will be responsible for coordination and planning of all programming at the station. (RL Exh. 5 at 1; Tr. 200.) He will work at the station a minimum of 20 hours per week. (RL Exh. 5 at 1.) In the event Real Life's application is granted, Tullos will adjust his commitment as Associate Pastor at the First Baptist Church, Mandeville, Louisiana, so as to permit him to work at the station on a part-time basis. He will either reduce his present position at the church to part-time or he will leave his position at the church. (RL Exh. 7 at 2; Tullos, Tr. 206.) He has no obligation to remain in his position at the First Baptist Church. (Tullos, Tr. 206.) Tullos will give first priority to fulfilling his commitment to serve as part-time program director of Real Life's station. (RL Exh. 7 at 2; Tullos, Tr. 199.)

30. Tullos was born in Baton Rouge. He resided in Baton Rouge from 1977 to 1981. Tullos received his high school diploma from Baton Rouge Magnet School. (RL Exh. 7.) Tullos received a Bachelor of Arts in Communications with a minor in Religious Education from Louisiana College in 1985. In 1987, Mr. Tullos received a Master of Arts in Communications from the Southwestern Baptist Theological Seminary in Fort Worth, Texas. (RL Exh. 7 at 1.)

31. Tullos has been employed at the following broadcast stations: (a) KSMI-FM, Donaldsonville, Louisiana (1979-81)-disc jockey; (b) KALB(AM), Alexandria, Louisiana (1981-82)-disc jockey; (c) WBRH, Baton Rouge, Louisiana (1978-81)-disc jockey; and (d) KDBS(AM), Alexandria, Louisiana (1984-85)-music director. (RL Exh. 7 at 1.)

Emergency Power

32. Real Life proposes to install emergency power generating equipment at its studio and transmitter site. Real Life also proposes to use a microwave studio-to-transmitter link (STL) and consequently, its station will not be dependent on public utilities to maintain operations during power failures or other emergencies. The station will participate in the local, state, and national Emergency Broadcast System. (RL Exh. 10 at 1.)

JSM'S PROPOSAL

Organization

33. JSM is a non-profit corporation that was organized under the laws of Louisiana. (RL Exh. 20.) JSM is affiliated with the Jimmy Swaggart Bible College ("JSBC"), which also is a non-profit corporation. (RL Exh. 19A at 46.)

34. JSM's corporate purpose is the establishment of an evangelistic pentecostal outreach. Another stated purpose is to encourage and promote Christian education. (RL Exh. 19 at 3.) Jimmy Swaggart ("Swaggart") is the president. He is empowered to manage JSM's affairs and to appoint directors who serve at his discretion. (RL Exh. 19 at 26.) Swaggart delegated authority to prosecute JSM's application to Teddy Carroll Sauceman ("Sauceman"). (Sauceman, Tr. 218-20.)[11]

35. Sauceman was directed to prepare the application by Richard Eaton who at that time was Sauceman's immediate superior. Eaton was later replaced by Bob Anderson. (Sauceman, Tr. 221.) Sauceman has no knowledge whether Swaggart or the JSM board of directors reviewed the application before it was filed. (Sauceman, Tr. 216, 245.) But as the designated general manager, Sauceman prepared the original draft of the entire application and he prepared the sample programming log. (Sauceman, Tr. 250.) At times, Sauceman received instructions with respect to the application from Swaggart through the latter's personal secretary. (Sauceman, Tr. 246.) JSM's board of directors has been kept apprised of the progress of the application and of Sauceman's involvement in its prosecution. (Sauceman, Tr. 222.)

36. It is found, based on the foregoing, that Sauceman's actions on JSM's behalf were done with the knowledge and consent of JSM, Swaggart and the board of directors. Therefore, it is found that Sauceman has authority to represent the interests of JSM in connection with the prosecution of its application before the FCC.[12]

JSM's Educational Objectives

37. A primary purpose of JSM and its affiliated JSBC is to encourage and promote Christian education, to train teachers, and to spread the Christian Gospel through education. JSM projects that all operations of the Baton Rouge station, including general educational programming, public affairs, and light entertainment will facilitate the educational and cultural objectives of JSM. (JSM Exh. 1.)

38. JSM proposes to integrate the proposed radio station into the overall cultural and educational objectives of JSM through JSBC. (JSM Exh. 1.)[13] JSM intends to provide the community with educational and instructive programming that is not now available and to provide students at JSBC with new courses and practical opportunities in broadcasting. (*Id.*) However, as in the case of Real Life, there is no evidence of JSM having any cultural objective and therefore none is found.

Community Need As Ascertained By JSM

39. JSM acknowledges its obligation as existing licensee of Station WLUX, Baton Rouge, to ascertain the community's "problems, needs and interests." (Sauceman, Tr. 234-35.) Station WLUX is owned and operated by JSM and it has been a licensee in Baton Rouge since 1973. JSM posits that as the general manager of WLUX,

Sauceman has become familiar with the community's needs and interests by speaking directly with a number of community leaders at which subjects of local public interest were discussed. (Sauceman, Tr. 235.) Such interviewees include the Governor of Louisiana, local mayors, the District Attorney, various representatives of the Louisiana State Government, and religious leaders from other denominations. (Sauceman, Tr. 236.)

40. An additional resource for ascertaining need are the several "outreach" programs through Swaggart's Family Worship Center which involves visiting such places as nursing homes. The needs uncovered during these outreach efforts are discussed periodically at staff meetings that are attended by Sauceman. (Sauceman, Tr. 237.)

41. Another resource used to determine community need is the JSBC, a local educational institution that would be in proximity to community needs. (JSM PFC at 22.) JSBC established a formalized program as a part of its curriculum which requires each student to spend a minimum of 2 hours per week in direct community involvement. Projects include: prison ministry, nursing home ministry, and working with inner-city children and adults. (Sauceman, Tr. 306.)

42. While JSM has shown evidence of substantial resources for use in determining community need, there has been only a slight showing of what needs have been identified which JSM's programming would meet. As indicated below, JSM will carry forward an educational and instructional program that is coordinated with the JSBC. (JSM PFC at 6.) Specifically, JSM proposes the following:

> Through that affiliation with the Bible College, JSM will achieve its educational and cultural objectives both through programming made available to the general public over the air, which is designed to provide the Baton Rouge community with educational and instructive programming that is not now available, and by providing college students of the Jimmy Swaggart Bible College courses and practical opportunities in the broadcast field not now available to them.

(JSM Exh. 1; JSM PFC at 6.) Thus, it is found that the JSM community need has been determined to be educational opportunities that are available at the JSBC, which opportunities would be offered on the radio station to residents of the Baton Rouge community that receive a signal, and interested members of the JSBC student body.

43. Because of the coordinated programming described above, it is necessary to consider the evidence presented by JSM on the curriculum offered at JSBC. It offers various courses in the broadcast field that are made available to students both in and out of an established communications major. For example, it offers courses in the Principles of Christian Radio, Communications Law, Teleproduction Techniques, Advanced Radio Production, Advanced Teleproduction Techniques, Audio Recording and Mixing Techniques, Broadcast Copyrighting, Mass Communication, EFPIENG Remote Production, Radio and TV Announcing, Radio and TV Management, Media Communications Internship, and Christian Programming/Directing. (JSM Exhibit 2; Sauceman, Tr. 304.) These are courses that are directly related to broadcasting. There are also other courses offered of a religious nature and JSBC offers several major courses in Bible, Theology, Pastoral Ministry, Evangelism, Music and Elementary Education that lead to a baccalaureate degree. (Haley Tr. 336.)

JSM's Proposed Programming

44. JSM will broadcast 24 hours per day Monday through Saturday with specific programs allotted to time slots around-the-clock. (RL Exh. 20 [JSM Form 340].) On Sunday, JSM proposes to broadcast from 12 Midnight to 5:00 a.m., then break until 12 noon when broadcasting commences through 12 midnight. JSM intends to offer courses for credit over the proposed radio station. (Sauceman, Tr. 268.) But the particular curriculum to be offered for credit has not yet been decided. (Sauceman, Tr. 269.) Programming will provide to the Baton Rouge community instructional courses coordinated with the president of JSB and faculty members. (JSM Exh. 1.) Programs also will be offered over the radio that will not be for credit. (*Id.*)

45. JSM's programming will provide instructional and educational programming to the Baton Rouge community and JSM will offer college courses for college credits to residents of the community. The programming will be instructional, and will be coordinated with JSBC's president and faculty advisors. (JSM Exh. 1.) Public affairs programming involving community leaders and speaking to community issues will also be included as an integral part of JSM's proposal. (*Id.*)

46. JSBC is commencing a correspondence school that will utilize the radio station to broadcast instructional programming to students residing in the Baton Rouge area. (JSM Exh. 2.) Those courses will be for college credit courses as well as non-college credit courses. (Haley, Tr. at 330.)

47. The courses will be designed to make college courses available at JSBC to students in the Baton Rouge area who are otherwise unable to attend college. The courses will be programmed at various times during the listening day in order that all members of the Baton Rouge community will have access to the programming. (JSM Exh. 2.) Textbooks, course materials, admission procedures, and related administrative procedures now exist at JSBC. (Sauceman, Tr. 269.) A curriculum committee which consists of the heads of various departments at JSBC will make recommendations to the president of JSBC and he shall decide the courses that will be offered over the radio. (Haley, Tr. 329-30.)

48. JSM would offer courses that it has determined would have broad community appeal that would not be limited to religious teaching. But, as indicated above, JSM has not offered evidence on the data that it has obtained that shows a connection between community need and proposed programming. Nonetheless, JSM represents that it will broadcast correspondence courses to the community in mathematics and languages. (Sauceman, Tr. 282.) Credit earned in correspondence courses would be accepted towards degree courses at JSBC. (Haley, Tr. 339.) Requirements of the college such as ministry visits and attendance at the Family Worship Center would not be required of the correspondence students. (*Id.*)

49. Public affairs programs would include health care, street improvement and local government. (Sauceman, Tr. 282.) All issues of community interest are to be open for discussion. (Haley, Tr. 341.) And in the general educational, public affairs and instructional programming there

would be no limitations on access to correspondence courses by reason of the applicant's affiliation or non-affiliation with JSBC. (Haley, Tr. 341.)

JSM's Related Educational Activities

50. It is noted that JSM is presently affiliated with JSBC, an institution of higher education which would serve as a resource for developing and presenting educational programming. The faculty of JSBC will be involved in the development and production of the various courses to be offered over-the-air. (JSM PFC at 10.) Students also will participate in developing and producing courses, a methodology which will present additional educational opportunities for them in the academics involved and in the broadcasting. (*Id.*, JMS Exh. 1.)

51. JSM will integrate the operation of the proposed radio station into the college's educational objectives by using it as an instructional tool for students. JSBC offers several courses in radio journalism and communications arts as part of its existing curriculum. The non-commercial educational broadcast station will be used as an instructional tool for college students enrolled in those courses and other courses at the college. (JSM Exh. 1.) Haley, the president of JSBC, will work to ensure the maximum utilization of the proposed radio station in the on-going curriculum of the college and college students will be able to receive course credit for work at the radio station. (JMS Exh. 2.)

52. The music element, which will be a form of "Christian music", is intended to compliment and facilitate the college's broader goal of Christian education. (JSM Exh. 1.) Thus, JSM represents that the entertainment element is an integral part of its educational and cultural objectives. (*Id.*, JSM PFC at 12.) The educational and cultural objectives of JSM and JSBC are so intertwined with JSBC's curriculum and educational philosophy that the music element will be directed at the student and faculty of JSBC, with only those members of the Baton Rouge community being considered who by happenstance may share the same interest for the offered entertainment.

53. JSM also offers evidence tending to show that it needs the new noncommercial station to carry out its educational goals which cannot be reached through local station WLUX. The latter is a day-time AM commercial station that does not serve the college's perceived need to provide an opportunity for hands-on student training. (Sauceman, Tr. 288.) Therefore, it is self-evident that a day-time only station will not meet the educational or training needs of students during the academic year. Also, the policies of a commercial station would have intrinsic limitation on the amount of any student involvement. (Sauceman, Tr. 288-89.) JSBC does not have adequate radio facilities to provide a student broadcast training program and the proposed noncommercial station will fill that need. (Haley, Tr. 333.) Also, JSBC does not presently offer any college courses for credit *via* radio broadcasting as commercial Station WLUX does not provide an adequate vehicle for offering college credit courses. (Haley, Tr. 319, 327.) A new non-commercial FM facility would provide the means to offer college credit courses over a radio broadcast frequency. (*Id.*)

JSM'S OTHER FACTORS

Management's Broadcast Experience And Local Residence

54. JSM's proposed general manager, Mr. Sauceman, has served in various broadcast positions. Such positions include general/operations manager of Son Life Radio Group where he had ultimate responsibility for the oversight management of eight radio stations. (JSM Exh. 1.) He also was formerly director of Station WKIZ in Key West, Florida. He held the same position at Station WYPR in Danville, Virginia and at Station WSLG in Gonzales, Louisiana. (*Id.*) Since 1984 to the present, Sauceman has served as general manager of Station WLUX in Baton Rouge. (*Id.*)

55. JSM also claims credit for local residence of its management. Sauceman has lived within the service area since November 1968. Five members of JSM's board of directors have been residents of Baton Rouge for ten years. (JSM Exh. 1.)

JSM's Established Broadcast Resources

56. JSM was not organized solely for the purpose of constructing and operation of the noncommercial FM channel that is in issue in this case. JSM presently owns six commercial radio stations organized as the Son Life Group. JSM also produces a daily (30 minutes) TV program and a weekly (1 hour) TV program that are carried, respectively, on 145 stations and 245 stations nationwide. (JSM Exh. 1.)

JSM's Ability To Meet Community Needs

57. As found previously, JSM has not made an evidentiary showing that it has ascertained actual community needs for specific noncommercial radio broadcast services. Nor has it shown the specific programming that meets each of the ascertained needs. *See* Paras. 44 to 49, *supra*. But JSM, through the students and facility of JSBC, are involved in the Baton Rouge community on a daily basis including the college's prison nursing home, and inner-city ministries. (Haley, Tr. 306-308.) *See also* Para. 40, *supra*. This evidence is sufficient to find that JSM has in place the capability to ascertain community needs in those three respects. Also, it is found that with the established resources of JSBC, JSM will be able to offer to the Baton Rouge community, immediately upon the commencement of broadcast operations, correspondence courses in socially useful subjects of mathematics and languages. Also, JSM has shown that JSBC students have a need for a noncommercial radio facility at which to gain hands-on broadcasting experience that would materially supplement related ongoing courses in communications that are offered at JSBC.

JSM's Superior Coverage

58. The findings with respect to broadcast coverage made at Paras. 6 to 7 above are incorporated here. The evidence establishes that JSM will provide a second service to 29,578 residents in its uncommon area while Real Life will provide a second service to 7,211 residents in its uncommon area. Both parties will provide the same coverage in the common service areas. (Joint Engineering Exhibit No. 1.) However, JSM has shown a superior coverage by a factor of 22,000 persons and is entitled to a comparative credit.

SHARE - TIME ARRANGEMENT

59. Real Life opposes a share-time arrangement. It contends that it is particularly concerned that a share-time arrangement would dilute and obscure its identity as an educational entity because Swaggart and JSM already have national and local recognition and are associated with programming dominated by preaching and fundraising. But no reliable evidence is offered to establish those points. Nor is it relevant to the issues.

60. Real Life further argues that in the event a share-time arrangement is imposed on the applicants, it should be implemented in such a way as to minimize any confusion which might occur as to the source of programming on the station at any given time, and to assure that not only the entire broadcast week, but also the more attractive time periods (i.e., when radio audiences are typically the greatest) were fairly and equally divided between Real Life and JSM.

61. JSM asserts that a time-sharing arrangement would limit JSM's ability to provide the instructional programming to members of the Baton Rouge community because many residents are restricted in their ability to take college courses by work shifts and other scheduling conflicts. A time-share arrangement would, therefore, limit public access to the instructional programming and thus hinder the educational goal of JSM. (Haley, Tr. 342.)

62. JSM further argues that the programming proposal of Real Life is so philosophically different from the goals of JSM that a forced time-share arrangement, and the resulting public confusion, would significantly hinder the achievement of JSM's educational and cultural objectives. (Haley, Tr. 344.)

63. The subjective assertions made by Real Life and by JSM are accepted as valid concerns as to why the parties are not voluntarily willing to operate under a share-time arrangement. There are no findings made with respect to whether preaching and related fundraising will be a part of the broadcasting by either party. But both parties are oriented towards religious broadcasting and it would be impractical to design a share-time schedule that would accommodate the needs and desires of both Real Life and JSM. More importantly, however, the evidence establishes that Real Life has no more than a hopeful expectation that LSU will lend its academic resources in support of Real Life's programming. In contrast, JSM has the resources in place of JSBC, the supporting broadcast personnel of Station WLUX, and the existing broadcasting resources of the Son Life Group.

CONCLUSIONS OF LAW

64. Section 307(b) of the Communications Act of 1934, as amended, (the Act) requires the "fair, efficient and equitable distribution" of broadcast service. Therefore, an assessment of the evidence must be made under the applicable Commission standard in determining which applicants meet the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

65. The comparative standard was established by the Commission for noncommerical broadcast facilities in the *New York University case, supra.*[14] There were two mutually exclusive university applicants for a new FM noncommercial frequency. The Commission held:

> We are not persuaded that our traditional areas and populations, and other available services criteria are appropriate in this instance, nor are we persuaded that the factors involved in the usual standard comparison are appropriate in the context of this proceeding.

10 Radio Reg 2d (P&F) at 216. It is noted that the Commission so held in 1967, just two years after it had adopted its *Policy Statement* to be applied in comparative commercial broadcast proceedings. *See* fn. 14, *supra*. The Commission then articulated the issues to be tried which included a comparative coverage issue limited to noncommercial FM "available services" and a specially drafted comparative standard:

> To determine the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants or whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

10 Radio Reg 2d (P&F) at 217.

66. In a related consideration, the Review Board considered there to be a two-fold nature of educational broadcasting: (a) educational, cultural and entertainment, (2) programming in furtherance of the educational institution's instructional program. *New York University II*, 10 F.C.C. 2d 53, 55 (Review Bd 1967).

Integration Of Cultural And Educational Objectives

67. In a later noncommercial case, the Review Board followed the Commission's framing of the issue under *New York University, supra. Pacifica Foundation*, 21 F.C.C. 2d 216, 217 (Review Bd 1970). The narrow facts of that case expanded the issue to address cultural needs of the community, an element not present here. But in *Pacifica*, where none of the applicants is a university, the Review Board held that an inquiry should have been made by the parties into "the manner in which the [cultural and] educational objectives meet the needs of the community to be served." *Id.* at 218.

68. In the latest case, *Seattle Public Schools*, 3 F.C.C. Rcd 3028 (Review Bd 1989), the Review Board observed:

> The unmistakable inference to be drawn from the language of the host of policy documents relating to noncommercial broadcast service - - - is that irrespective of the nature of the licensee, the Commission's performance expectations center on the licensee's service to the listening (and viewing) community, and not on service to the licensee itself.

3 F.C.C. Rcd at 3035. The *Seattle Public Schools* case, following the earlier holdings of *New York University* and *Pacifica Foundation, supra*, requires a comparative evaluation that examines the extent to which each applicant's proposal is integated into its overall cultural and educational objectives, whether each applicant's proposal was responsive to community needs, and whether any other factors in the record establish one applicant's comparative superiority over the other. *See HDO, supra* at Para. 12.

69. A first consideration is whether either applicant should be accorded the status of an educational institution which would result in a lesser burden of ascertainment of community needs. *Compare Pacifica Foundation, supra* at 218. For reasons stated below, Real Life's proposal is more community oriented than educational while JSM's proposals are more internalized to meet the educational needs of JSBC's students. *Compare Seattle Public Schools, supra* at 3034.

70. Both applicants, however, were required to use a "reasonable method" to ascertain the "problems, needs and interests of the service areas." *Id.* at 3044. In this case, through its ministry programs whereby students would visit persons, nursing homes and inner-city families and report their findings to faculty, JSM has adopted a reasonable method to ascertain Baton Rouge's problems, needs and interests. It is also significant that JSM will continue to identify the community's needs and interests in that way. (Haley, Tr. 307-308.) Real Life, on the other hand, has only relied on Dean's experience as a broadcasters in the community. But there is no evidence of Dean taking steps to visit segments of the community. Nor has there been any showing that Garlow or Tullos have met or would meet Real Life's ascertainment needs. Sauceman, on the other hand, met with the Governor, local political figures and religious leaders to ascertain community needs and interests and he will continue to meet with such persons. Therefore, it is concluded that JSM's ascertainment methodology, i.e., the student ministries and the face-to-face meetings, was superior to Real Life's. It is further concluded that Real Life has failed to meet its burden of proof to show that it has ascertained the problems, needs or interests of the Baton Rouge community or that it has a reasonable method that is designed to provide an understanding of the problems, needs and interests of Baton Rouge.[15] *Seattle Public Schools, supra* at 3044.

71. It has been found that Real Life has no more than hopes and expectations for LSU's participation. The radio station might be a significant educational resource for LSU students but there is no reasonable assurance that LSU will use it. The evidence shows, through Dr. McCameron, that courses to-be-selected by he and Real Life are "subject to approval of the LSU administration" followed by "coordination of courses with various academic departments at LSU." *See* Para. 14, *supra*. This evidence indicates an uncertainty as to whether approval will be obtained by the LSU administration. Alternatively, any approval may have conditions attached that would give LSU control over programming and LSU is not a party to the application. A similar concern about control over programming policies is raised by the academic coordination that would be required which also could lead to control by LSU over programming policies of the applicant. The conclusions reached here do not mean or imply that Real Life could not join with LSU to present a reliable proposal which would show a reasonable assurance of being fulfilled. For example, Real Life could have ascertained the interests and needs of the LSU student body and through the efforts of Dean, there could have been model curricula developed which would be acceptable to the LSU administration. Assurance of fulfillment would be further aided by a preliminary round of coordinating meetings with faculty that would be impacted by the proposed programming. But all that Real Life appears to have done for purposes of trial (as distinguished from a long-term methodical proposal having reasonable assurance of fulfillment) was to obtain the speculative statement from Dr. McCameron which he executed on January 2, 1989, just three weeks before the hearing was scheduled to commence.[16] *See* Para. 3, *supra*. The burden is on Real Life to established by a preponderance of the evidence that the public interest will be served by a grant of its application. *Telestar, Inc.*, 2 F.C.C. Rcd 7352, 7353 (Comm'n 1987). Where there has been a failure in proof to show a reasonable assurance by a preponderance of the evidence to effect educational programming, the public interest is not served by the grant of such an application. *Id.*

72. Also, the failure on Real Life's part to secure a commitment from LSU, while recognizing that Real Life and LSU have no other affiliation, supports the conclusion reached here that Real Life is not an "educational institution." Therefore, Real Life must rely on the proposal it intends to offer the community in its capacity as an applicant whose sole purpose is to obtain a noncommercial license and construct and operate an FM station in Baton Rouge. For reasons stated above, Real Life has not shown that it has acertained the needs and interests of Baton Rouge or that it will be able to later ascertain those needs and interests. Therefore, it is concluded that Real Life has also failed in its burden of proof to show by a preponderance of the evidence that it has a reasonable method to ascertain community cultural and educational needs and interests.

73. For its part, however, JSM has met its burdens of proof. The evidence establishes that JSM is closely affiliated with JSBC which has an ongoing communications educational program. JSM also would be able to draw on the synergies of the commercial Station WLUX and the resources of the Son Life Radio Group's battery of broadcast stations. In view of the disclosed interrelationships with JSBC, it is established as a fact that JSM will be able to obtain the approval of the JSBC administration. It is also established as a fact that JSM probably will be successful in coordinating its radio courses with JSBC faculty. In these regards, it is noted that the witness presented for cross-examination by JSM was Dr. Haley, the president of JSBC who has the "primary responsibility for counsulting with the general manager of the proposed station and facilitating the integration of the radio station into the educational and cultural goals of the college and JSM." (JSM Exh. 2; Haley, Tr. 300-345.) Thus, JSM has met its burden of proof by showing by a preponderance of the evidence that JSM's radio programming will be integrated into the educational objectives of JSM. JSM also has a close relationship with JSBC.[17] Therefore, since it is closely allied with a college, JSM is not required to make a showing of ascertainment to the same degree as a non-educational institution such as Real Life. *See Pacifica Foundation, supra* at 218. Nonetheless, JSM has established a reasonable method for ascertaining Baton Rouge's problems, needs and interests.

OTHER FACTORS

Comparative Coverage

74. Under the respective proposals, each applicant would serve about 29,000 persons not to be served by the other applicant. All presently receive fewer than five noncommercial educational FM signals. All of the 29,578

persons proposed to be served by JSM currently receive only one service. By comparison, Real Life proposes to provide a second service to a fewer number of persons, 7,211. The remaining population in Real Life's proposed service to underserved areas currently receives two, three or four services. The largest preferences are traditionally awarded for the provision of first and second services. *See FBC, Inc.*, 95 F.C.C. 2d 256 (Review Bd 1983). Here, neither applicant would provide a first service to uncommon areas and both applicants would provide similar total service to underserved areas. However, in the matter of second service, JSM's proposal is superior and for this reason, JSM is entitled to a moderate comparative coverage preference. *See Christian Broadcasting of the Midlands, Inc.*, 99 F.C.C. 2d 578, 582-83 (Review Bd 1984); *Communications Properties Inc.*, 92 F.C.C. 2d 45 (Review Bd 1982); *Town and Country Radio, Inc.*, 70 F.C.C. 2d 572 (Review Bd 1978).

Service To The Blind And Handicapped

75. JSM has made no showing with respect to plans to serve the blind and the handicapped, and it makes no claim for a comparative preference based on service to the blind and handicapped. Real Life seeks credit for proposing to make its SCA subchannels available to radio reading services for the blind and print handicapped. (Real Life PFC at 49.) Again, Real Life has failed to make an adequate ascertainment. The evidence offered through the testimony of Dean establishes only that he (Dean) believes that Real Life's programming would be beneficial because they are designed as audio-only courses, thus meeting the need of the blind and print handicapped. The Commission has held that it will not distinguish among applicants based on proposed specialized programming where there is a substantial or reasonable amount of such programming available in the service area. *George E. Cameron, Jr. Communications*, 71 F.C.C. 2d 460 (1979); *Scott & Davis Enterprises, Inc.*, 88 F.C.C. 2d 1090 (Review Bd 1982); *Flint Family Radio, Inc.*, 69 F.C.C. 2d 38 (Review Bd 1988). Here, Real Life has failed to show that there is an absence, *ergo* need, for such service. Nor does it show how its radio programming would be more beneficial to the blind and print handicapped than would JSM's programming. For example, there is no managerial personality identified who has an expertise or demonstrated interest in assisting through radio programming the blind and print handicapped. Nor is any of the three proposed managers, Dean, Garlow or Tullos, assigned the responsibility to hire or retain as consultant a person who would have the necessary expertise. However, Real Life proposes to make available its SCA facilities to a Commission licensee, Radio For The Blind and Print Handicapped, which would be a creditable provision if Real Life had met its burden to show the amount of such programming that is presently available. Also, the record fails to reflect evidence on the methodology used by Radio For The Blind and Print Handicapped which would be compatible on Real Life's SCA facilities and which would meet an ascertained community cultural or educational need. Accordingly, no comparative credit will be awarded to Real Life for its proposed services to the blind and print handicapped.

Program Announcements

76. Real Life seeks to gain a comparative preference for a proposal to broadcast announcements describing local educational opportunities and facilities. (Real Life PFC at 49.) In support of such a finding, Real Life relies on *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 43 Radio Reg. 2d (P&F) 731 (Comm'n 1978). But the Commission there was determining what limitations should be imposed on noncommercial broadcasting with respect to promotion of sales of products or services and other commercial announcements. In the context of seeking to preserve the noncommercial nature of educational broadcasting, the Commission noted the distinction in "inform[ing] listeners of the occurrence of community events rather than to promote the sale of goods or services." *Id.* at 741-42. Such analysis and pronouncement by the Commission cannot be construed as an adoption of a policy to credit applicants in comparative proceedings who propose to announce community programs and events. Real Life will not be awarded a comparative preference for its proposed program announcements.

Proposed Hours Of Operation

77. The evidence is considered to determine whether there are any "substantial operating differences" between the two proposals. *Seattle Public Schools*, *supra* at 3045. Both parties have proposed to broadcast 24 hours per day Monday through Friday and substantially the same number of reduced hours on Saturday and Sunday. *Compare* RL Exh. 20 [JSM Form 340] and JSM Exh. 5 [Real Life Form 340]. *See also* Paras. 17, 18 and 43-49, *supra*. There are no significant differences noted in the two operating proposals (a comparison which does not take into account the quality of programming). Nor do the qualification and broadcast experience of the respective station managers for Real Life and JSM effect the conclusion that there would be no substantial operating difference that would warrant an enhancement of one proposal over the other. Therefore, there is no comparative preference awarded for proposed hours of operation.

Emergency Power

78. Real Life is the only competing applicant that has proposed to install emergency power. *See* Para. 32, *supra*. Real Life relies on *Gilbert Group, Inc.*, 88 F.C.C. 2d 401 (Review Bd 1981), a commercial FM case wherein the Review Board upheld the trial judge's award of a "very slight preference" for the one applicant that proposed emergency power. *Id.* at 406-407. But there is no mention in that decision as to whether a similar preference would be awarded in a noncommercial case. There the Review Board cited the Commission's *Addendum To Policy Statement*, 2 F.C.C. 2d 667 (1966) wherein the Commission recognized the benefit to auxiliary power transmission facilities based on experienced loss of broadcast time during a northeast power failure in 1965. The Commission held:

> - - - it [is] appropriate to add the acquisition and proposed use of auxiliary power equipment as a factor of decisional significance in comparative AM and FM broadcast proceedings.

Id. Again there is no direction given with respect to noncommercial cases. The Commission has made clear, however, that an auxiliary power preference:

> may be awarded only in AM and FM radio broadcast proceedings.

Apogee, Inc., 59 Radio Reg 2d (P&F) 941, 943 (Comm'n 1985). In that case, the Commission had reversed a Review Board award of a minor preference for auxiliary power to an applicant in a TV comparative proceeding. A similar result occurred in an earlier TV case. *Minority Broadcasters of East St. Louis, Inc.*, 57 Radio Reg 2d (P&F) 1390 (Comm'n 1985). But there was no distinction made with respect to noncommercial FM broadcasting cases. The same policy consideration to encourage auxiliary radio transmission as a public safety measure during times of unexpected power outages would analytically be equally applicable to noncommercial radio stations as distinguished from TV because people are less likely to watch TV during an emergency (e.g. vehicles have radios but not TVs). Therefore, absent a specific ruling to the contrary by the Commission, Real Life will be awarded a very slight comparative preference as "another factor" for its proposed auxiliary power.

SHARE - TIME ARRANGEMENT

79. The parties have represented that their proposals would not accommodate a share-time arrangement. Both parties represent themselves as having a religious orientation and neither wishes to be confused or connected with the other. It is an accepted fact that religious differences, whether in theology, liturgy, or proselytyzing methods, are distinctly personal matters that could be adversely effected by a forced share-time arrangement. *See Southeastern Bible College, Inc.*, 85 F.C.C. 2d 936, 938 (Review Bd 1981) (a similar concern about a forced arrangement was shared in the trial judge's refusal to impose an involuntary arrangement). The Review Board reversed the trial judge and directed a share-time arrangement, primarily because the evidence had failed to show that either applicant had ascertained the community's needs. *Id.* at 939. Even the Review Board recognized some of the problems that are inherent in a non-voluntary arrangement. *Id.* at 40. But an important distinction was noted. First, the Review Board allotted each applicant alternating days instead of sharing broadcast time on the same days. But more importantly, the Board noted that:

> - - - neither applicant proposed in-school instruction by radio, which might make daily availability of the broadcast facility essential.

Id. Here, JMS has proposed a use of the station which would in substantial part provide "in-school instruction by radio" that would include the need for the station's availability for student instruction as learning broadcasters. Also, in this case JMS has far greater potential to keep abreast of community needs through its visiting ministry programs to the socially disadvantaged and imprisoned segments of the population. Thus, the holding of *Southeastern Bible College, supra* is clearly distinguished from this case. Also, since JSM will provide service to 22,000 more people, it would not be in the public interest to deprive such persons of a second audio service for a shared portion of the week.

ULTIMATE CONCLUSIONS

80. JSM has shown by a preponderance of the evidence that it has the means and has use of a reasonable method to successfully ascertain community needs. Although it has not used the student-faculty resources to ascertain what the needs and desires of the community may be, it is much more likely to achieve that end than Real Life's sole reliance on Mr. Dean's local broadcast experience. Therefore, JSM receives a slight preference for the likelihood of the integration of JSM's operations into its cultural and educational objectives. JSM also receives a moderate comparative coverage preference. Real Life receives a very slight preference for its proposed auxiliary power. There is no comparative credit awarded to Real Life for its proposed services to the blind and handicapped because Real Life failed to meet the Commission's standard for such comparative credit. Neither party receives a preference for proposed hours of service since there is no substantial operating differences shown to exist. Finally, it is concluded that this case is not appropriate for an enforced share-time agreement that the parties are unwilling to undertake voluntarily.

ORDER

Accordingly, based on the foregoing, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or unless the Commission reviews the Initial Decision on its own motion,[18] the application of Real Life Educational Foundation Of Baton Rouge, Inc. (File No. BPED- 840322CA) IS DENIED.

IT IS FURTHER ORDERED that the application of Jimmy Swaggart Ministries (File No. BPED-840822IF) for a construction permit for a new noncommercial educational broadcast station on Channel 203C2 in Baton Rouge, Louisiana IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] Former applicant Radio For The Blind And Print Handicapped, Inc. was dismissed voluntarily and the applicant's name and file number were ordered removed from the case caption. *See Order*, FCC 88M-4049, released November 25, 1988.

[2] *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (Comm'n 1965) (principal criteria consisting of diversification of media control, integration of ownership with management, local residence and civic activities). Comparative signal coverage was independently specified in the *HDO* and it will be treated independently in this Initial Decision. But it will be weighed as an "other factor" under the comparative analysis. *See Seattle Public Schools, et al.*, 3 F.C.C. Rcd 3028, 3045 (Review Bd 1989).

[3] *See McCormick On Evidence* §272 (1984): "If a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that she does not do it creates the presumption that the testimony, if produced, would be unfavorable." *See also Washoe Shoshone Broadcasting*, 3 F.C.C. Rcd 3948, 3953 (Review Bd 1988).

[4] There was nothing in the demeanor of Mr. Dean or in the plausibility of his testimony that would cause Real Life's testimony to be rejected as not believable. But the reliability of Dean's account of the extent of any commitment made by Simon and McCameron is further diluted by the fact that Dean has only been a part-time student at LSU. (Dean, Tr. 114.) Thus, Dean might not gain the same degree of confidences from Simon and McCameron as would a full-time graduate student. *Compare Chirino* v. *N. T. S. B.*, 849 F.2d 1525, 1530 (D.C. Cir. 1988).

[5] Here, for the first time, Real Life suggests that there would also be high school credit courses offered. There is no basis on which to credit any proposal for high school credit because the programming methodology and content would first need approval from local school boards and/or the State Superintendent of Schools. There is no evidence that any such authorizations have been considered. Also, based on common knowledge of the study habits of high school students, it is most unlikely that high school courses would be offered for credit through radio broadcasting. Even where students are bedridden, local school systems usually set up a speaker phone system for class participation. But no realistic system would rely on voluntary radio listening.

[6] Real Life lists specific "representative" instructional programs: (1) American Diplomacy-Development of U.S. foreign policy from the second world war to the 1980's; (2) Telling the Story-Fundamentals of radio journalism; (3) Global Resources-the challenges of interdependence and the relationship between national resources and the interaction between economic and political order; (4) The Challenge of China and Japan-a political science course examining the political life in China and Japan; (5) Contemporary Western Europe-various governing processes in Western Europe today; (6) Small Business Management-Major factors in owning and operating a small business; (7) Radio School of the Bible-Bible courses offered for credit through the Moody Bible Institute Correspondence School; and (8) You and the Law-the concept and principles of law. (RL Exh. 3.)

[7] Public affairs programs include the following: (1) a call-in program each day, Monday through Friday; (2) Focus on the Family, each day, Monday through Friday, and 11:00-11:30 a.m. Sundays; (3) Jobs for the Jobless, each day, Monday through Saturday, and 3:25-3:30 p.m., Saturdays and Sundays; (4) Youth Rap, Fridays and Saturdays; (5) Acadiana Alive, Sundays; and (6) Issues in Baton Rouge, Sundays. (RL Exh. 3 at 3-6.)

[8] Real Life lists specific programs in the category of general education to be broadcast each day, Monday through Friday: (1) The Case Report; (2) Your Money in Changing Times; (3) Psychiatry and You; (4) Think About It; and (5) Grace to You. On Saturday, Real Life's station will broadcast Threshold, and on Sunday the station will broadcast Grace to You and Threshold. (RL Exh. 3 at 3-6.)

[9] "SCA" means subsidiary communications authorization whereby the Commission permits the use of subcarriers of an FM (or other) channel to "piggyback" other material such as readings for the blind and computer data transmission. *Channels*, Field Guide 1988. *See* FRE 803 (17) (market report used in the industry are generally accepted as reliable evidence).

[10] The evidence on Dean's civic involvement has no relation to the proposed instructional programming or to Real Life's ability to produce it. Therefore, it will not be considered.

[11] Swaggart has control over JSM. He is its president and has authority to appoint directors who he can remove at will. The majority of the executive committee are Swaggart's close relatives. Swaggart signed the application himself. (RL Exh. 19 at 20-26.) This evidence is accepted for background purposes. But as there is no charges of "sham" or a hidden "real party-in-interest" there is no purpose in presenting a detailed description of JSM's structure beyond that stated above. There is also noted a similarity in Real Life's structure.

[12] The Presiding Judge is cognizant of the fact that Swaggart had previously fired Sauceman and later rehired him. (Sauceman, .Tr. 240.) While that evidence indicates that Sauceman's future as general manager may be uncertain, there is no guarantee that any employed general manager would have a "no-cut" contract. The fact that Swaggart is an established broadcaster in the area offsets any concern that the Baton Rouge station would not be able to operate without Mr. Sauceman's services as its general manager. There is also noted a similarity in Real LIfe's structure where Dean can be removed by the other six directors.

[13] JSBC was founded in 1984. It currently has an enrollment of 418 students. It offers an undergraduate Associates of Arts degree, a Bachelor of Sciences degree and a certificate through a one-year program. There is affiliated with JSBC the Jimmy Swaggart Theological Seminary (JSTS") that opened in 1988. JSTS offers a Masters Degree of Divinity and a Master of Arts in Theological Studies. JSBC and JSTS have a combined faculty of 28 full-time professors and 13 adjunct professors. (JSM Exh. 2.) JSBC is currently seeking accreditation from the Southern Association of Colleges and Schools. It is currently accredited by the Association of Christian Schools.

[14] *Compare* the process of comparative evaluation in commercial cases: *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (Comm'n 1965). There the Commission held that the primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communication, or diversification, and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F. C. C.*, 735 F.2d 601, 603-607 (D.C. Cir. 1984).

[15] The Presiding Judge recognizes that the Commission has removed the formerly-imposed burden on noncommercial licensees to make formal ascertainments. *Deregulation Order*, 98 F.C.C. 2d 746, 751 (1984). While rigid ascertainment is no longer required, the comparative issue must be addressed and on a comparative basis. Real Life's ascertainment methodology is non-existent and therefore flawed. *Compare Seattle Public Schools*, *supra* at 3045.

[16] The quality of the statement also leaves much to be desired under the standard of substantial evidence that is required under the APA. Dr. McCameron is offered as the "linchpin" between Real Life and the educational operation that Real Life seeks to integrate into its overall objective. Yet Dr. McCameron's testimony is only eight sentences of conclusory statements. Nothing is said about how he would go about seeking administration concurrence, the likelihood of obtaining it, other examples of success, and the method and time required for faculty coordination. The fact-finder is left in the dark.

[17] Swaggart is president of JSM and he also is chancellor of JSBC which equates to chairman of the board of directors with authority for adopting the policies of JSBC. (RL Exh. 19A at 32.) JSBC presently is seeking accreditation from the Southern

Association of Colleges and Schools and is currently accredited by the Association of Christian Schools International. (JSM Exh. 2.)

[18] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI INTERNATIONAL, INC. File No. I-T-C-89-155

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between and among the United States and the United Kingdom.

ORDER AND AUTHORIZATION

Adopted: November 29, 1989; Released: December 5, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 1, 1989 by MCI International, Inc. (MCII), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the United Kingdom and beyond. The application was placed on public notice on September 6, 1989. No comments were received.

2. MCII is a non-dominant international carrier currently providing international services to the points reached via the PTAT-1 cable system. MCII is currently authorized to acquire and operate a one-half interest in one E-1 circuit[1] in the PTAT-1 cable system for service to the United Kingdom, the Republic of Ireland, Bermuda and points beyond.[2] It now proposes to acquire and operate an additional one-half interest in eight E-1 circuits in the PTA-1 for service to those countries. MCII states that it will be using the capacity in PTAT-1 to supplement existing facilities and not to divert any portion of its traffic from the existing common carrier facilities.

3. The Commission stated in its *Private Submarine Cable Decision* [3] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[4] In this context, we find that MCII's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[5] Furthermore, we find that MCII's application does not raise any economic impact issues.[6]

4. Upon consideration of the application, we find that authorization of the facilities requested would serve the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-89- 155 IS GRANTED, and MCII is authorized to:

a. acquire on an IRU and/or lease basis, as appropriate, a one-half interest in eight E-1 circuits in the PTAT-1 cable;

b. acquire and operate necessary domestic connecting facilities; and

c. utilize said facilities to provide MCII's regularly authorized services between the U.S., on the one hand, and the United Kingdom, the Republic of Ireland and Bermuda, on the other hand, and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] An E-1 circuit is equivalent to a capacity of 2.048 megabits per second (Mbps).

[2] *See* CICI, Inc. *et al* 4 FCC Rcd 6622 (1989).

[3] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[4] This requirement was restated in the *International Competitive Carrier* decision, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[5] The Commission places no special burdens on any carrier making an application for private cable capacity. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[6] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm.

The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-124

In the Matter of

Determination of Interstate
and Intrastate Usage of
Feature Group A and
Feature Group B Access Service

MEMORANDUM OPINION AND ORDER

Adopted : November 2, 1989 ; Released : December 5, 1989

By the Commission:

I. INTRODUCTION

1. In April 1985, this Commission issued a Notice of Proposed Rule Making[1] that established this Joint Board to develop a comprehensive solution to longstanding problems relating to the measurement and verification of interstate and intrastate usage of Feature Group A (FGA) and Feature Group B (FGB) access services by interexchange carriers (IXCs) for access charge billing purposes. We subsequently expanded the scope of this proceeding to include the treatment of FGA and FGB traffic for purposes of jurisdictional separations.[2] Numerous parties filed comments in response to these notices. [3]

2. The Joint Board presented its recommendations on the jurisdictional measurement of FGA and FGB traffic for cost separations and billing purposes in a *Recommended Decision and Order* released February 27, 1989 (*Recommended Decision*) [4]. First, it recommended that this Commission require use of the Entry/Exit Surrogate (EES) measurement method to allocate FGA and FGB traffic between the interstate and intrastate jurisdictions for cost separations purposes.[5] Second, it recommended that we authorize deviations from the EES method, but only in certain narrowly defined circumstances.[6] Third, it recommended that minutes attributed to the interstate jurisdiction be identical for both cost assignment and recovery purposes, and that the EES method, or another authorized measurement technique, be used not only for determining cost separations but also for interstate access charge billing.[7] The Joint Board also noted that problems could potentially occur if each jurisdiction billed for the same minutes of use, and stated that the states and local exchange carriers (LECs) should use the method they use for interstate access billing for intrastate access charge billing purposes to the extent they use a per minute of use rate structure for intrastate access billing. Fourth, while declining to establish uniform, nationwide procedures to verify interstate and intrastate usage of FGA and FGB services by the IXCs, the Joint Board recommended certain basic verification guidelines for consideration by the Commission and the states. We hereby adopt these recommendations and the analysis and reasoning on which they are founded.[8]

II. BACKGROUND

3. Subject to limited exceptions, LECs provide interstate switched access services pursuant to interstate tariffs filed with this Commission and provide their corresponding intrastate services through tariffs at the state level. With many access services, particularly those that provide automatic number identification (ANI) capability[9], jurisdictional usage is readily segregable for this purpose. However, for other access arrangements, such as FGA and FGB services, that generally do not provide ANI capability, the LECs typically lack the technical ability to identify and measure jurisdictional usage.

4. To identify the jurisdictional nature of this traffic, LECs have made use of call detail records maintained by the IXCs. These data reveal what portion of the traffic enters the IXC network in the state in which the called station is situated, and what portion is routed from the point of entry to a called station in a different state.[10] The methods that the LECs have used to determine and report the jurisdictional nature of these calls and their right to verify and audit the jurisdictional usage actually reported have been matters of dispute between the LECs and the IXCs.

5. In October 1983, the National Exchange Carrier Association (NECA) filed its first annual interstate access tariff that included provisions for determining jurisdictional usage for access charge calculations for FGA and FGB. The Commission rejected this tariff[11] and revisions to it[12] and instead specified an interim procedure to be used by the LECs for assessing interstate access charges on FGA and FGB traffic until a better method could be devised.[13] On September 11, 1984, MCI filed a petition asking this Commission to declare that it had preempted state and local regulation of the manner of determining the intrastate switched access usage over FGA and FGB access lines for purposes of intrastate access charge calculation. MCI also asked us to approve, on an interim basis, various "allocational factors" then being used by the IXCs to adjust their jurisdictional usage projections to account for the existence of "false" intrastate traffic[14].

6. In ruling on the MCI petition in its *EES Order* [15], we stopped short of preemption and declined to either require the LECs to adhere to the procedures in NECA's switched access tariff for determining usage levels of intrastate FGA and FGB access services, or to prohibit the LECs and state authorities from imposing reasonable auditing or verification requirements as a condition of obtaining intrastate FGA and FGB access. We concluded that interstate usage for cost recovery purposes should, on an interim basis pending resolution of this docket, be determined in accordance with the EES method, and directed the LECs to incorporate revisions to that effect in their interstate switched access tariff filings.[16] We also found that the IXC allocational factors used to adjust for false intrastate traffic were unwarranted and declined to approve them.

7. In the *EES Order*, we recognized that the states and the LECs had a legitimate interest in assuring the accuracy of the IXC usage estimates through audits of call detail records but declined to impose verification requirements that were discriminatory, unduly burdensome, or

intrusive on IXC operations. In addition, we stated that LEC tariffs should provide for specific intervals of substantial duration between audits, such as, for example, annual intervals.

III. JOINT BOARD FINDINGS AND RECOMMENDATIONS

8. The Joint Board recommended that we adopt a uniform method of measuring FGA and FGB traffic for separations purposes, finding that this approach is compelled by established separations principles.[17] Specifically, it recommended that we require use of the unadjusted EES method for cost separation purposes. The Joint Board concluded that the unadjusted EES measurement method was the best available technique for jurisdictional determination of FGA and FGB traffic for cost separations purposes because it is relatively easy to implement and administer and because it is already in use in most jurisdictions. The Joint Board found that there was no indication, based on actual experience, that use of this method resulted in any serious problems or inaccuracies.[18] The Joint Board further found that since the EES method is based upon the IXC's existing call detail information, it should be more accurate than alternatives that are based on unprovable assumptions about the nature of "false intrastate" traffic.[19] It added that since "false traffic" varied among locations and IXCs depending upon geography, population, and network characteristics, it was unlikely that a nationwide adjustment factor of any kind would produce more accurate results because it would necessarily ignore varying local conditions and could actually compound the measurement problem. The Joint Board concluded that development and implementation of more precise and comprehensive methods for measuring FGA and FGB access traffic would be unnecessarily costly and appeared to go beyond the scope of this proceeding.

9. Despite the obvious utility of the unadjusted EES method, the Joint Board recognized that EES could produce undesirable anomolies in the measurement of FGA and FGB traffic in certain limited areas of the country. For example, it concluded that there might be certain limited areas with particularly high levels of "false" traffic, where minor adjustments or even alternatives to the EES technique could produce more accurate results without sacrificing ease of administration or the benefits of uniformity. Thus, although the Joint Board did not recommend the establishment of nationwide adjustment factors to EES to address the problems created by "false traffic", it found that deviations from or adjustments to the EES method for jurisdictional cost separations purposes should be permitted in certain limited situations. The Joint Board also found that the implementation of the EES method did not require changes in the language of the relevant Part 36 rules.[20] However, it recommended that any carrier proposing a modification to the EES approach for jurisdictional cost separations be required to obtain prior approval of the proposed substitute from the relevant state commission(s), as well as this Commission.[21] In order to obtain approval of the alternate method, the Joint Board recommended that the carrier be required to make certain specific showings.[22]

10. The Joint Board further determined that the EES method should be used for access charge billing purposes to avoid problems that could potentially occur if federal and state jurisdictions billed for the same minutes of use. Thus, to the extent that states and LECs use a per minute of use rate structure for intrastate access charge billing purposes, the Joint Board found that they should use the EES method, or an authorized substitute method.

11. The Joint Board also found that specific, uniform, nationwide verification procedures are not presently necessary to assure that states and LECs do not impose unreasonably burdensome or inconsistent verification procedures on the IXCs.[23] Instead, it recommended certain guidelines for the LECs to file in their interstate tariffs.[24] Generally, it recommended permanent establishment of the guidelines set forth in the *EES Order*, with certain adjustments.[25] These guidelines permit LECs to require that the IXCs keep relevant call detail records from which a Percentage of Interstate Usage (PIU) can be derived and make those records available for inspection and audit "at specific intervals of substantial duration (as, for instance, annual intervals) . . . ."[26] The Joint Board further recommended that the Commission modify the *EES Order* guidelines to limit verification audits of IXCs to not more than one per year, except in extreme circumstances, such as when an IXC reports an intrastate allocation in one update period that represents a substantial change over its most recent reported figures, and that change is not due to seasonal shifts or other identifiable reasons. The Joint Board further recommended that audits be conducted by independent auditors if the LEC and the IXC or the IXC alone is willing to pay the expense since this would significantly reduce concerns about the proprietary nature of the traffic data without sacrificing reliability.

IV. DISCUSSION

12. The Joint Board has recommended a comprehensive, long-term solution to problems relating to jurisdictional allocation of FGA and FGB traffic for cost separations and billing purposes. Its recommendations are designed to produce a complete, uniform, and permanent methodology for measurement and verification of FGA and FGB usage by IXCs that properly balances ease of implementation and administration with adherence to established separations principles. We hereby adopt these recommendations as well as the analysis and reasoning on which they are founded.

13. Adoption of the Joint Board's recommendations, particularly its proposed use of the unadjusted EES method to measure FGA and FGB access traffic for separations purposes, represents a significant step toward achievement of a permanent uniform solution to the FGA and FGB usage measurement problem. As the Joint Board observed, in the absence of a uniform measurement method for jurisdictional separations, a LEC could conceivably recover in both the interstate and intrastate jurisdiction for the same investment and expenses, or fail to recover the costs involved in either jurisdiction.[27] For the reasons discussed in the Joint Board's recommendation, we believe that the unadjusted EES method is the best nationwide measurement approach available in terms of accuracy and ease of implementation. Since the EES method is based upon call detail information already in possession of the IXCs, the information used to perform EES measurements is available to the IXCs at little or no additional cost, further simplifying implementation of this measurement method. Indeed, this method has been used successfully for the past several years by the states and in

the federal access tariffs. We also believe that the Joint Board is correct to recommend a degree of flexibility through its proposed procedures that allow implementation of "adjustment factors" or alternative measurement techniques in localities with particularly high levels of "false traffic".[28] We concur with the Joint Board that these adjustments need not be established as nationwide adjustments to EES because these anomolies generally occur only in limited geographical "pockets" such as metropolitan areas that straddle state boundaries.[29] We adopt the guidelines and process that that Joint Board has recommended for carriers/states to obtain variances from the general rule.[30]

14. We also endorse the Joint Board's conclusion that the EES method should be used to allocate the FGA and FGB traffic not only for cost separations purposes, but also for interstate access charge billing purposes.[31] As we concluded in the *EES Order* and the *Supplemental NPRM*, the method of determining jurisdictional allocation of FGA and FGB access minutes can affect both revenue recovery and the assignment of costs of those services. Thus, we agree with the Joint Board that that any comprehensive and permanent resolution of the measurement issue must include consideration of both jurisdictional costs and revenues. As the Joint Board observed, if this were not the case, a mismatch in costs and revenue could result, leaving a LEC with an over-recovery or underrecovery of its investment and expenses. To avoid these potential adverse consequences, we direct the LECs to use the EES measurement method in their interstate access tariffs.[32] We also agree with the Joint Board that the states and the LECs should use an intrastate billing approach that avoids the problems that could potentially occur if each jurisdiction billed for the same minutes of use. Clearly, where both jurisdictions employ a minute of use billing approach, the measurement surrogates must be the same to assure that 100%, and only 100% of the minutes are billed.

15. Finally, we agree that the Joint Board's proposal to establish general verification guidelines in lieu of uniform, nationwide procedures, strikes an appropriate balance between the needs of the LECs and states on the one hand, and the concerns of the IXCs on the other.[33] We believe that the Joint Board was correct in its conclusion that the guidelines contained in the *EES Order* in this regard should be retained subject to certain modifications. Therefore, we require only that the LECs amend their tariff verification provisions to comport with the permanent guidelines described in the the Joint Board's *Recommended Decision*. We also modify our *EES Order* guidelines, as the Joint Board recommends, to limit verification audits of IXCs to no more than one per year except in extreme circumstances. Moreover, we accept its recommendation that audits be conducted by independent auditors if the LEC and the IXC or the IXC alone is willing to pay the expense. As the Joint Board observes, the use of such auditors would significantly reduce concerns about the proprietary nature of the data being audited without sacrificing reliability. We believe that the recommended procedures will ensure that reliable data will be available to perform EES measurements without overburdening IXCs.

16. The rules contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements that are applicable to the public, and will not increase or decrease burden hours on the public. We also certify that the requirements contained in the Regulatory Flexibility Act are not applicable to this proceeding.[34]

V. ORDERING CLAUSE

17. THEREFORE, IT IS ORDERED, that the recommendations contained in the Recommended Decision and Order of the Federal-State Joint Board released February 27, 1989, are ADOPTED, effective January 1, 1990.[35] To facilitate review of any necessary tariff changes, we direct carriers to file their revisions in the general access tariff filing to be effective January 1, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Order Inviting Comments, CC Docket No. 85-124, FCC 85-570 (released Oct. 28, 1985) (inviting comments on the revenue/billing aspects of the measurement problem).

[2] Supplemental Notice of Proposed Rule Making, CC Docket No. 85-124, FCC 86-460 (released Dec. 9, 1986)(inviting comments on the related jurisdictional cost separations issues).

[3] A list of the parties that filed comments in response to these notices is contained in Appendices A and B of In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Services, *Recommended Decision and Order*, 4 FCC Rcd 1966 (1989).

[4] In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Services, *Recommended Decision and Order*, 4 FCC Rcd 1966 (1989).

[5] Under the EES method of jurisdictional determination, calls that enter an IXC network in the same state as that in which the called station is located are deemed to be intrastate, and calls that terminate in a different state than their IXC point of entry are considered interstate.

[6] *See* discussion *infra* at para. 13.

[7] *See* discussion *infra* at para. 16.

[8] *See generally* Section IV.

[9] ANI capability enables the carrier to identify the originating number of a call which, when combined with the called number, reveals the jurisdictional nature of the call.

[10] Call detail, used by the IXCs to bill their own customers, consists of call-by-call information, including the call's terminating address, the call duration, the trunk groups or access lines over which the call is routed, and the point at which the call enters the IXC's network. In the absence of ANI, however, call detail does not permit an IXC to identify the originating address of a call.

[11] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 97 FCC 2d 1082 (1984)(*ECA Tariff Order*).

[12] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, FCC 84-188 (released Apr. 27, 1984) (*April 27 Tariff Order*).

[13] *Id. See* sections 2.3.14 and 2.3.15 of NECA's interstate switched access tariff, effective May 25, 1984.

[14] "False" intrastate traffic describes the situation in which a call appears to be intrastate in nature from IXC call detail information but is, in fact, an interstate call. Similarly, "false" interstate traffic describes a situation involving apparently interstate traffic that is actually intrastate traffic. *See also Recommended Decision* at 1977, n. 16.

[15] MCI Telecommunications Corporation, Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Services, FCC 85-145 (released Apr. 16, 1985) (*EES Order*), *recon. denied*, FCC 85-595 (released Nov. 13, 1985).

[16] *EES Order* at 14, 17, para. 25, 31-32.

[17] *See Recommended Decision* at 1979, para. 55. According to the Joint Board, in the absence of a uniform measurement method for cost separations purposes, a LEC could conceivably recover in both the interstate and intrastate jurisdictions for the same investments and expenses, or recover for them in neither. The Joint Board urges that such a result would violate the separations principle that the costs associated with a service allocated to both the federal and state jurisdictions add up to 100%, but no more than 100%, of the total costs being allocated. *See, e.g., Hawaiian Telephone Co. v. Public Utility Commission*, 827 F.2d 1264, 1274-1276 (9th Cir. 1987); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 740 F.2d 566, 567 (7th Cir. 1984); *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, 1146-1147 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *New England Tel. Co. v. Public Utilities Comm'n*, 448 A.2d 272, 298 (Me. 1982).

[18] The Joint Board noted that the Common Carrier Bureau records reflected no complaints (formal or informal) from IXCs, states, or LECs regarding use of EES during the past several years. *Recommended Decision* at 1979, n. 49.

[19] Indeed, the Joint Board found that the volume of false intrastate traffic was not even sufficiently quantified in the record to permit development of a reasonable adjustment factor. *See Recommended Decision* at 1971, para. 37.

[20] *See* 47 C.F.R. § 36.125. The Joint Board found that the EES surrogate was consistent with these rules, and that any localized substitute methods authorized must also be consistent with these rules.

[21] The Joint Board noted that a state commission may also propose an adjustment to the EES method for jurisdictional cost separations that it believes will yield more accurate results, and should indicate the study area(s) affected. Any state commission proposing such an adjustment for separations purposes, it says, should also be required to obtain Commission approval as discussed above. *See Recommended Decision* at 1979, n. 52.

[22] Specifically, the Joint Board recommended that the LEC be required to show that: (1) the proposed alternative is responsive to specific conditions under which the EES method yields a significant degree of traffic misclassification; (2) the alternative yields significantly more accurate results than the unadjusted EES method; (3) the alternative is as easy to implement and verify as the EES method or, that any additional administrative or cost burdens are justified by the added degree of accuracy; (4) the alternative is consistent with the "relative use" requirement of the relevant cost separations rules; and (5) any coordination with neighboring states necessary to avoid traffic misclassification as a result of the proposed alternative has been accomplished. The Joint Board stated that in the event that the Commission should disapprove a filing seeking approval of a substitute method that the affected state commission believes is otherwise consistent with these requirements, the Commission should refer the matter to a Joint Board. *See Recommended Decision* at 1979, n. 55.

[23] *See Recommended Decision* at 1975, para. 74.

[24] Although the Joint Board did not propose restricting the states to use of the verification procedures in the interstate tariffs, it stated that the information gathered for purposes of identifying interstate usage should suffice for intrastate verification as well, and encouraged states to avoid overburdening carriers with two sets of verification procedures. *See Recommended Decision* at 1975, para. 75.

[25] The Joint Board also noted that some of the provisions contained in the interstate LEC access tariffs on file with the Commission are inconsistent with the *EES Order*. Accordingly, it recommended that we require the LECs to amend their verification provisions to comport with the permanent guidelines established in its *Recommended Decision*.

[26] The Joint Board stated that it does not intend this to be an open-ended recordkeeping requirement, specifying that it would expect the IXCs' call detail records to reflect only the period since the last annual audit. If inspections are less frequent than annually, reasonable recordkeeping adjustments may have to be made. *See Recommended Decision* at 1979, n. 65.

[27] *See Recommended Decision* at 1973, para. 55.

[28] *See Recommended Decision* at 1974, paras. 60-61.

[29] *See Recommended Decision* at 1974, para. 60.

[30] We delegate to the Common Carrier Bureau authority to act on any such requests.

[31] *See Recommended Decision* at 1974, para. 67.

[32] LECs will need to revise their tariffs to make current tariffs consistent with measures adopted in this order.

[33] *See Recommended Decision* at 1975, para. 73.

[34] In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this Report and Order in the Federal Register. Because of the nature of local exchange and access services, we have concluded that small telephone companies are dominant in their field of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-89 (1983). Nevertheless, as we have stated in other proceedings, we are committed to reducing the regulatory burdens on small telecommunications companies whenever possible, consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate procedures to analyze the effect of proposed regulations on small telephone companies. The rules we adopt will not have an adverse effect on such companies.

[35] This order is adopted pursuant to Sections 4(i), 4(j), 201, 202, 203, 205, 221, 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), 201, 202, 203, 205, 221, 403 and 410 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-559

In re Applications of

CORYDON BROADCASTERS LIMITED — File No. BPH-860221MN

HARRISON COUNTY BROADCASTING CO. — File No. BPH-860221MT

For Construction Permit
for a New FM Station on Channel 299B
in Corydon, Indiana

ORDER

Adopted: November 28, 1989 ; Released: December 6, 1989

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. On July 27, 1989, the Commission, in *Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989), reinstated certain applications for further consideration by the Mass Media Bureau. Pursuant to that Commission action, the Bureau has now designated for hearing the application of *Pruitt and Owen*, DA 89-1400, released November 22, 1989. In *Special Markets, supra*, 4 FCC Rcd at 5753, and note 5, the Commission indicated that the Bureau's subsequent designation order would require the Review Board to reopen the record in the above-captioned Corydon, Indiana proceeding and remand the case for further action by the presiding Administrative Law Judge. This is so because the Pruitt and Owen application is mutually exclusive with the two other pending applications in the Corydon proceeding, *see Pruitt and Owen, supra*, note 1.

2. ACCORDINGLY, IT IS ORDERED, That the record in this proceeding IS REOPENED, and that the case IS REMANDED to the Administrative Law Judge for further action consistent with *Special Markets Media, Inc.*, 4 FCC Rcd. 5753 (1989), and *Pruitt and Owen*, DA 89-1400, released November 22, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-222

In the Matter of

Amendment of Section 73.202(b). RM-6259
Table of Allotments.
FM Broadcast Stations.
(Mexico Beach, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 17, 1989; Released: December 5, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Robert G. Kerrigan (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 3109 (1988), proposing the substitution of Channel 257C2 for Channel 257A at Mexico Beach, Florida, and modification of the license for Station WMQA(FM) to specify operation on the higher class channel. Petitioner filed supporting comments stating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 257C2 for Channel 257A at Mexico Beach, Florida, since it could provide the area with an expanded FM service. Channel 257C2 can be allotted to Mexico Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.6 kilometers (1.6 miles) east[1] to avoid a short-spacing to Station WKSM(FM).[2] Channel 258C2, Fort Walton Beach, Florida.

3. As requested, we are modifying the license of Station WMQA(FM) to specify operation on Channel 257C2 in accordance with Section 1.420(g) of the Commission's rules. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 19, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Mexico Beach, Florida	257C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WMQA(FM), Mexico Beach, Florida, IS MODIFIED, to specify operation on Channel 257C2 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Mexico Beach, Channel 257C2, are North Latitude 29-56-32 and West Longitude 85-23-31.

[2] Formerly Station WFTW(FM).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-321

In the Matter of

Amendment of Section 73.202(b), RM-6270
Table of Allotments,
FM Broadcast Stations.
(Volcano, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 20, 1989; Released: December 5, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Timothy D. Martz (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4273 (1988), proposing the allotment of FM Channel 299A to Volcano, Hawaii, as that community's first FM service. Petitioner filed comments in support of the *Notice* and stated his intention to apply for the channel, if allotted. No other comments were received.

2. As indicated in the *Notice*, Channel 299A can be allotted to Volcano, Hawaii, in compliance with the minimum distance separation requirements of the Commission's Rules.[1] We believe the public interest would be served by allotting Channel 299A to Volcano, Hawaii, as that community's first FM service.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 19, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Volcano, Hawaii	299A

4. The window period for filing applications will open on **January 22, 1990,** and close on **February 21, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 299A at Volcano are 19-26-00 and 155-15-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-547

In the Matter of

Amendment of Section 73.202(b),	RM-6899
Table of Allotments,	RM-7021
FM Broadcast Stations.	RM-7100
(Hannahs Mill and Perry, Georgia)	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 17, 1989; Released: December 5, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein three separately filed petitions for rule making. Two petitions were filed requesting an allotment for Hannahs Mill, Georgia. Sam V. Stacy, Jr. ("Stacy"), seeks the allotment of Channel 264A (RM-6899) and Dewitt Coleman ("Coleman") requests allotment of Channel 266A (RM-7100) to Hannahs Mill, Georgia, as its first local service. The third petition, filed by Radio Perry, Inc. ("Perry"), licensee of Station WPGA(FM), Channel 265A, Perry, Georgia, seeks the substitution of Channel 265C3 for Channel 265A at Perry and modification of its license to specify the higher class channel (RM-7021). Coleman, Stacy and Perry each state an intention to apply for the requested channel, if allotted.

2. Coleman asserts that Channel 266A would be a superior allotment for Hannahs Mill because there are existing tower sites available for the use of Channel 266A that would not be available for the use of Channel 264A. We can only allot one of the two requested channels to Hannahs Mill. Therefore we request that any additional information or comments to support the proposals be submitted.

3. Channel 264A can be allotted to Hannahs Mill in compliance with the minimum distance separation requirements of the Commission's Rules, with a site restriction of 7.2 kilometers (4.5 miles) southeast in order to avoid a short-spacing to a construction permit (BPH-860924ID) for Station WHMA(FM), Channel 263C at Anniston, Alabama, or Channel 266A can be allotted to Hannahs Mill in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 10.1 kilometers (6.3 miles) southwest to avoid a short-spacing to a construction permit for Station WKHX(FM), Channel 268C at Marietta, Georgia.[1]. Channel 265C3 can be substituted for Channel 265A at Perry, Georgia, in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.9 kilometers (9.9 miles) southwest.[2]

4. We believe the public interest would be served by seeking further comments on the allotment of Channel 264A or 266A to Hannahs Mill, Georgia, as the community's first local service or the upgrading of Station WPGA(FM) from Channel 265A to Channel 265C3. In this regard, we are providing the proponents with an opportunity to demonstrate why their respective proposals should be preferred. The parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). We note that the Hannahs Mill proposal is seeking a first local service, while the Perry proposal seeks to upgrade an existing facility. We also note that a first local service (priority three) is generally preferred over an upgrade to an existing station (priority four).

5. As requested, we shall propose to modify the license of Station WPGA(FM) to specify operation on Channel 265C3. In accordance with Section 1.420(g) of the Rules, we shall not accept competing expressions of interest in use of the channel at Perry or require the proponent to demonstrate the availability of an additional equivalent channel for use by other interested parties.

6. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Hannahs Mill, Georgia	--	264A
	or	
Hannahs Mill, Georgia	--	266A
	or	
Perry, Georgia	265A	265C3

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **January 26, 1990,** and reply comments on or before **February 12, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Sam V. Stacy, Jr.
61 Terracedale Ct.
Griffin, Georgia 30223
(Hannahs Mill proponent)

Lowell L. Register, President
Radio Perry, Inc.
P.O. Box 980
Perry, Georgia 31060

Daniel F. Van Horn
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Avenue,
N.W.
Washington, D. C. 20036-5339
(Counsel for Dewit Coleman,
Jr.)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The proposed coordinates for Channel 264A at Hannahs Mill are North Latitude 32-52-31 and West Longitude 84-18-46, and the coordinates for Channel 266A at Hannahs Mill are North Latitude 32-51-49 and West Longitude 84-25-10.

[2] The coordinates for Channel 265C3 at Perry, Georgia, are North Latitude 32-20-52 and West Longitude 83-50-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-549

In the Matter of

Amendment of Section 73.202(b), RM-6744
Table of Allotments,
FM Broadcast Stations.
(Muskegon and Manistee, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 20, 1989; Released: December 5, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Richard L. Culpepper (petitioner), seeking the substitution of FM Channel 300B1 for Channel 300A at Muskegon, Michigan. Petitioner also requests modification of its construction permit for Station WMHG-FM, to specify operation on Channel 300B1. Petitioner submitted information in support of the proposal and expressed his intention to apply for the channel.

2. Channel 300B1 can be allotted to Muskegon in compliance with the minimum distance separation requirements provided Channel 300A (vacant) is deleted from Manistee, Michigan.[1] Channel 300A was allotted to Manistee in MM Docket 88-157. *See* 3 FCC Rcd 6819 (1988). The channel was available for application from January 10, 1989, until February 9, 1989. Petitioner has proposed the substitution of FM Channel 268A for Channel 300A at Manistee. Channel 268A can be allotted to Manistee in compliance with the Commission's spacing requirements.[2] Since Muskegon and Manistee are both located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence must be obtained. The proposal for Muskegon must conform with the technical requirements of Section 73.1030(c) (1)-(5) of the rules regarding the Commission's monitoring station at Allegan, Michigan. We shall propose to modify the construction permit of Station WMHG-FM to specify operation on Channel 300B1 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the Muskegon, Michigan area, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Muskegon, Michigan	300A	300B1
Manistee, Michigan	249A, 300A	249A, 268A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 26, 1990,** and reply comments on or before **February 12, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lauren A. Colby
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21701
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 300B1 at Muskegon are 43-17-41 and 86-13-12.

[2] The coordinates for Channel 268A at Manistee are 44-14-48 and 86-19-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-550

In the Matter of

Amendment of Section 73.202(b), RM-6983
Table of Allotments,
FM Broadcast Stations.
(Knob Noster, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 17, 1989; Released: December 5, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Brick Broadcasting Company (petitioner), licensee of FM Station KXKX, Knob Noster, Missouri, seeking the substitution of Channel 289C3 for Channel 288A at Knob Noster. Petitioner also requests modification of its license for Station KXKX to specify Channel 289C3 instead of Channel 288A.

2. We believe petitioner's proposal warrants consideration. Channel 289C3 can be allotted to Knob Noster in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site provided Channel 289A (vacant) is deleted from Wheeling, Missouri.[1] Petitioner has proposed the substitution of Channel 290A for Channel 289A at Wheeling. Channel 290A can be allotted to Wheeling consistent with the mileage separation requirements at the city reference site.[2] Channel 289A was allotted to Wheeling, Missouri, in MM Docket 88-329. *See* 4 FCC Rcd 3907 (1989). The filing window dates for Channel 289A at Wheeling opened on June 19, 1989, and closed on July 19, 1989, and there are no applications on file for the allotment. We shall also propose to modify the license of Station KXKX, Channel 288A, to specify operation on Channel 289C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide wide coverage area station to Knob Noster, Missouri, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Knob Noster, Missouri	288A	289C3
Wheeling, Missouri	288A	290A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 26, 1990,** and reply comments on or before **February 12, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bick Broadcasting Company
P.O. Box 711
119 N 3rd Street
Hannibal, MO 63401

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 289C3 are 38-46-28 and 93-37-34.

[2] The coordinates for Channel 290A are 39-47-12 and 93-23-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORPORATION — File No. 829-DSS-MP/LA-88

For Modification of Authorization for the GSTAR III Domestic Fixed-Satellite

and

GEOSTAR POSITIONING CORPORATION — File Nos. 974-DSE-P/L-88, CSG-88-023-P/L

Application for Blanket License for User Terminals in the Radiodetermination Satellite Service

ORDER AND AUTHORIZATION

Adopted: November 21, 1989; Released: December 6, 1989

By the Chief, Domestic Facilities Division:

1. By an *Order and Authorization* [1] adopted August 12, 1988, the Common Carrier Bureau conditionally granted the application of GTE Spacenet Corporation (GTE Spacenet) to modify the construction permit for its GSTAR III satellite to allow the construction and operation of a second Radiodetermination Satellite Service (RDSS) receive-only antenna on the spacecraft capable of receiving transmissions from mobile terminals in Caribbean and South American locations. By the same order, we conditionally granted the application of Geostar Positioning Corporation (Geostar) for a blanket license to operate 1500 RDSS user terminals in the contiguous United States, Puerto Rico, U.S. Virgin Islands, and on or over ocean areas outside of the territory of the foreign countries within Geostar's space segment coverage area which includes North America, northern South America and the Caribbean. The authorization order stated that final instruments of authorization for both GTE Spacenet and Geostar would be issued when the Department of State informed the Commission that the U.S. had fulfilled its obligations under both Article XIV (e) of the INTELSAT Agreement and Article 8 of the INMARSAT Convention. The Department of State recently informed the Commission that these obligations have been met.[2]

2. Accordingly, IT IS ORDERED that the condition for final authorization imposed in granting GTE Spacenet Corporation's application to modify GSTAR III (File No. 829-DSS-MP/LA-88) has been satisfied and that GTE Spacenet Corporation may construct and operate the satellite as authorized.

3. IT IS FURTHER ORDERED that the condition for final authorization imposed in granting Geostar Positioning Corporation's application for blanket license for RDSS user terminals (File Nos. 974-DSE-P/L-88; CSG-88-023-P/L) has been satisfied and that Geostar Positioning Corporation may operate the user terminals as authorized.

4. This order is issued under Section 0.291 of the Commission's rules on delegations of authority and is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Mimeo No. DA 88-1265 (August 15, 1988).

[2] Letter from Director, Office of Satellite and Cable Policy, Department of State to Chief, International Facilities Division, FCC (August 30, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-548

In the Matter of

Amendment of Section 73.202(b), RM-7017
Table of Allotments,
FM Broadcast Stations.
(Clintonville, New Holstein and
Wautoma, Wisconsin)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: November 20, 1989; Released: December 5, 1989

By the Chief, Allocations Branch:

1. At the request of Sail Communication Corp. (petitioner), licensee of Station WJMQ(FM), Channel 221A, Clintonville, Wisconsin, the Commission has before it for consideration a petition for rule making proposing the substitution of Channel 222C3 for Channel 221A at Clintonville, and the modification of its station's license to specify the higher class channel. In order to accomplish the upgrade at Clintonville the petitioner suggests the substitution of Channel 225A for Channel 226A at New Holstein, Wisconsin, and the modification of the license of Station KFKQ(FM) at New Holstein to reflect the new channel. Petitioner also suggests the substitution of Channel 226A for vacant but applied for Channel 222A at Wautoma, Wisconsin.[1] Petitioner states it will construct the higher powered station, if permitted.

2. Channel 222C3 can be substituted for Channel 221A at Clintonville in compliance with the Commission's minimum distance separation requirements with a site restriction,[2] if the channel changes are made at New Holstein and Wautoma. Channel 225A can be substituted for Channel 226A at New Holstein at the site specified in Station KFKG(FM)'s construction permit.[3] Channel 226A can be substituted for Channel 222A at Wautoma at the existing allotment site.[4] Accordingly, we are issuing a *Show Cause Order* to Frederick W. Kinlow/F.W.K. Broadcasting, Co., the permittee of Station KFKQ(FM) at New Holstein, seeking comments as to why its permit should not be modified to specify operation on Channel 225A in lieu of Channel 226A.

3. Petitioner will be required to relocate its present transmitter site to effectuate the upgrade at Clintonville. As requested, we shall propose to modify the license of Station WJMQ(FM), Channel 221A at Clintonville to specify operation on Channel 222C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Clintonville.

4. Commission policy requires that the petitioner reimburse Station KFKQ(FM) for the reasonable costs of changing its frequency. Petitioner failed to state its intention to reimburse Station KFKQ(FM) in accordance with Commission policy. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Petitioner is, therefore, advised to state its intention regarding reimbursement of Station KFKQ(FM) in its comments herein. If this proposal is ultimately adopted, the sole applicant for Channel 222A at Wautoma, Wautoma Radio Company, will be permitted to amend its application to specify Channel 226A without loss of cut-off protection.[5]

5. In view of the fact that Clintonville could receive expanded FM coverage, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Clintonville, Wisconsin	221A	222C3
New Holstein, Wisconsin	226A	225A
Wautoma, Wisconsin	222A	226A

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Frederick W. Kinlow/F.W.K. Broadcasting Co., permittee of Station KFKQ(FM), Channel 226A, New Holstein, Wisconsin, SHALL SHOW CAUSE why its permit should not be modified to specify operation on Channel 225A in lieu of Channel 226A.

7. Pursuant to Section 1.87 of the Commission's Rules, Frederick W. Kinlow/F.W.K. Broadcasting Co., may not later than **January 26, 1990,** file a written statement showing with particularity why its permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Frederick W. Kinlow/F.W.K. Broadcasting Co., to furnish additional information. If Frederick W. Kinlow/F.W.K. Broadcasting Co., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Frederick W. Kinlow/F.W.K. Broadcasting Co., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Frederick W. Kinlow/F.W.K. Broadcasting Co.
W-238, S-6825 Hwy F
Waukesha, WI 53186

Wautoma Radio Company
981 Howard Street
Green Bay, Wisconsin 54303

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **January 26, 1990,** and reply comments on or before **February 12, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lyle R. Evans
P. O. Box 52
Mayville, WI 53050
(Consultant to petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The sole applicant is Wautoma Radio Company.

[2] The allotment of Channel 222C3 at Clintonville requires a site restriction of 14.5 kilometers (9 miles) northeast of the city in order to avoid short spacings to Station WBWI-FM, Channel 223B, West Bend, Wisconsin, Station WDUX-FM, Channel 224A, Waupaca, Wisconsin, and a proposal to substitute Channel 222A for Channel 221A at Spencer, Wisconsin. *See* the counterproposal advanced in MM Docket No. 89-137, 4 FCC Rcd 4904 (1989). The "cut-off" date in that proceeding was August 7, 1989, before the filing of the instant petition. We utilize coordinates for Channel 222C3 at Clintonville of 44-42-36 and 88-37-37. We note that the site specified by the petitioner cannot be used consistent with the Commission's minimum distance separation requirements because of the Spencer proposal.

[3] The coordinates are 44-02-18 and 88-09-06.

[4] The coordinates are 44-04-18 and 89-17-30.

[5] We will serve the applicant with a copy of this *Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 1, 1989

ANNOUNCEMENT OF 83rd INTELSAT BOARD OF GOVERNORS' MEETING

The Board of Governors of INTELSAT will hold its 83rd meeting December 7th through 13th, 1989. Comsat, as U.S. Signatory to INTELSAT, will represent the United States at this meeting. Consistent with the Commission's directives and criteria in its initial Order in CC Docket No. 80-634 (*Comsat Structure Order*) concerning the public dissemination of INTELSAT-related documents and information, the agenda of BG-83 and certain related documents will be available for public inspection in Room 533, 1919 M St., Washington, D.C., on a daily basis as these documents are received by the Commission.

The public is invited to comment in writing on the issues that will be addressed at this INTELSAT meeting prior to the issuance of government instructions to Comsat. Comments will be reviewed and considered to the extent that time allows and may, if deemed appropriate, be incorporated into specific instructions. Because of the typically short periods of time between government receipt of the agenda and related documents and the time that instructions must be formulated, we urge parties wishing to comment to do so in a concise manner and as early as possible.

Parties should submit their comments as follows. The original and three copies should be sent to the Office of Assistant Bureau Chief/International, Common Carrier Bureau, Room 534, Federal Communications Commission, Washington, D.C. 20554, for inclusion in the public file in the Common Carrier Bureau International Reference Room. (Because of the informal nature of this mechanism, parties need not file copies with the Secretary of the FCC). In addition, a copy is to be forwarded to the Office of International Affairs, National Telecommunications and Information Administration, Room 4701, 14th and Pennsylvania Avenue, N.W., Washington, D.C. 20230 and to Bureau of International Communications and Information Policy, U.S. Department of State, CIP/REG, Washington, D.C. 20520. Comments should be labeled as File No. BG-83.

For further information contact Joel Pearlman at (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T
Communications Transmittal No. 1748
Tariff F.C.C. No. 9

International 800 Service

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1989; Released: November 30, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 21, 1989, American Telephone and Telegraph Company (AT&T) filed the above-captioned transmittal to reduce its rates for international 800 service from Canada to the United States. Petitions to reject or, alternatively, to suspend and investigate this transmittal were filed by US Sprint Communications Company Limited Partnership (US Sprint) and the National Telecommunications Network (NTN) on September 5, 1989. AT&T filed a reply on September 18, 1989. Transmittal 1748 is scheduled to become effective on December 1, 1989. For the reasons given below, we grant the petitions to reject the tariff filing.

II. BACKGROUND

2. This transmittal would reduce the monthly usage rates in specific rate steps for AT&T 800 Service (Canada) to the Mainland United States and Hawaii. On July 1, 1989, a new rate structure for this service became effective which caused significant rate increases for some customers due to their calling patterns. The rate reductions in Transmittal 1748 are designed to minimize that effect. According to AT&T, these revisions also seek to realign the rate levels for service from Canada to be more competitive with that of other carriers offering services from Canada that are similar to AT&T's 800 service. AT&T Description and Justification (D&J) at 2.

3. These rate reductions would produce a Service Band Index that falls below the lower limits of the All Other 800 services band in Basket 2. Section 61.49(d) of the Commission's Rules, 47 C.F.R. § 61.49(d) provides: "Each price cap tariff filing that proposes service category rates below applicable band limits established in § 61.47 (e), must be accompanied by supporting materials establishing that the rates cover the service category's average variable cost."

4. AT&T provides an incremental net revenue showing in an attempt to satisfy that requirement. AT&T computes both the total revenue it expects to generate as a result of the price reduction and the total cost associated with the anticipated additional level of demand. AT&T then divides the total revenue figure by the additional units of demand, and the cost figure by the additional units of demand. AT&T argues that so long as the revenues per unit of demand are greater than costs per unit of demand, it has satisfied the average variable cost or AVC standard.

III. SUMMARY OF PLEADINGS

5. US Sprint and NTN claim that AT&T has used the wrong cost standard to justify the instant rate reductions. They contend that AT&T's use of an incremental cost showing is not a satisfactory substitute for an AVC test and that AT&T's analysis does not meet the cost standard set forth in Section 61.49(d). NTN Petition at 3; US Sprint Petition at 2. Specifically, US Sprint argues that the analysis presented by AT&T does not satisfy the AVC showing required by the Commission to justify below-band rates. A true AVC showing, according to US Sprint, is a comparison of the proposed tariff rates and the estimated AVC, not the comparison between the change in revenues and the change in costs. US Sprint Petition at 2. Also, US Sprint claims that even if AT&T's analysis is equivalent to an AVC analysis, AT&T still fails to demonstrate that the revised rates cover costs. *Id.* at 3.[1]

6. US Sprint also maintains that AT&T should be required to identify separately each of the variable costs it includes in its analysis; specifically, access costs, billing and collection costs, and international accounting rates. Also, US Sprint asks that AT&T be required to supply relevant information concerning demand stimulation, including elasticity factors used and the average price with and without the proposed rate filing.

7. Finally, NTN claims that Transmittal 1748 "suffers from a general failure to supply acceptable factual support, regardless of the standard it uses." NTN Petition at 4. NTN maintains that AT&T furnishes merely conclusory statements regarding how its revenues will exceed long run incremental costs but provides no documentation for this assertion. Moreover, NTN alleges that AT&T must supply additional data and working papers with its D&J if it wishes to obtain a waiver or exemption from the AVC rule. *Id.* at 5.

8. In response, AT&T states that the petitioners have failed to demonstrate that its transmittal does not comply with the Commission's tariff filing requirements adopted in the *Price Cap Order*.[2] AT&T states that it has met the requirements of Section 61.49(d) for a below band reduction by supplying additional data and other support material which show that the proposed rate revisions cover average variable costs. [3] AT&T maintains that it provided a showing which demonstrates that the revenues associated with the change in projected demand due to proposed rates exceed the additional annual costs for the relevant service category in 1990, the first full year in which these revisions will be in effect. AT&T Reply at 3. AT&T claims that this Bureau rejected similar arguments raised in conjunction with its Transmittal No. 1690 below band filing, which AT&T justified using an incremental net revenue showing. *Id.*

9. AT&T further claims that the Commission's AVC standard requires inclusion only of non-fixed costs attributable to a service. *Id.* at 4 (citing *Price Cap Order*, 4 FCC Rcd at 3115). AT&T maintains that its cost showing in this filing "more than meets the AVC standard because it includes not only all non-fixed costs, but also fixed costs."

Id. at 5. Under this more stringent standard, AT&T argues, its proposed rates still produce revenues that exceed annual costs. *Id.*

IV. DISCUSSION

10. The Common Carrier Bureau has reviewed AT&T's cost showing for Transmittal 1748 and concludes that, for the reasons discussed below, AT&T's submissions do not satisfy the requirements of Section 61.49(d) of the Commission's Rules. Therefore, we are rejecting the tariff.

11. The price cap rules require that AT&T demonstrate the price for a below band service covers its average variable cost. Variable costs are those costs which vary as output varies. Average variable cost is a per unit cost, and consists of variable costs divided by the quantity of output for which the costs are incurred. To make an AVC showing, AT&T could compute a service's total variable costs for the relevant period and show that these costs were less than total revenue for the service. Total revenue greater than total cost means that average revenue, *i.e.*, price,[4] exceeds average variable cost because both total revenue and total variable cost are computed using the same demand base.

12. In Transmittal 1690,[5] and again in Transmittal 1762,[6] AT&T provided an incremental net revenue showing in order to satisfy the AVC requirement. In its showings, AT&T computed the new costs associated with the additional quantity demanded. AT&T computed the revenue resulting from the price change as the revenue from the additional units it expects to sell less the revenue lost due to the reprice of the existing units of demand. If incremental net revenue is computed this way, a showing that anticipated revenues are greater than anticipated costs is tantamount to a demonstration that the proposed rate is greater than AVC, provided that the previously existing rate covered average variable cost. Since both costs and revenues are computed using the same level of demand, average revenue (*i.e.*, price) is greater than average variable cost.

13. The incremental revenue showing AT&T provides with Transmittal 1748 differs from the showing AT&T provided with Transmittal Nos. 1690 and Transmittal 1762. The analysis that AT&T submitted with Transmittal 1748 compares only those revenues and costs associated with the additional quantity of demand stimulated by the price change. As in the showings submitted previously, AT&T calculated the additional costs associated with the anticipated demand. However, AT&T's revenue computation does not reflect the effect on base revenues of the changed prices; the revenue showing only includes a calculation of the additional revenue associated with the increase in demand.

14. The incremental net revenue showing set forth in the instant transmittal, unlike the incremental net revenue showings submitted previously, appears to be a showing unique to this filing. While containing some of the elements of the more standard and recognized incremental net revenue test, this variant of the incremental net revenue showing is not equivalent to an AVC showing. Under the showing AT&T presents, the revenues and costs attributable to the additional demand are each divided by the additional quantity demanded, and then compared. This showing would be equivalent to an AVC showing *only* if the price is the same for both the base and additional quantities demanded *and* if average variable cost does not vary as output varies (so that the AVC of total demand for the service and the AVC for the additional quantity are the same). Average variable costs are generally assumed in economic theory to vary with output, although it is theoretically possible for such costs to remain fixed over some level of output. Furthermore, in international 800 service, accounting rates are a significant portion of average variable cost, but net settlements may be more appropriately included in measures of incremental cost. Without much more detail than is provided by AT&T, it is impossible to reach any conclusion about the relationship between average variable cost and incremental cost for this service.

15. AT&T has failed to show that its average costs do not vary as its output varies. This showing is essential if this variant of the incremental net revenue showing is to be utilized as a means of satisfying the requirements of Section 61.49(d).

16. Our decision to reject this transmittal for failure to comply with the applicable cost support requirements is not, of course, a determination that the rates in this transmittal would be unreasonably low or would otherwise be unlawful. If it chooses to do so, AT&T may file the same rates on 45 days notice with revised cost support materials that satisfy the requirements in the relevant Commission rule.

V. ORDERING CLAUSES

17. Therefore, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions filed by AT&T Communications, in Tariff F.C.C. No. 9, Transmittal No. 1748, ARE REJECTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] US Sprint analyzes AT&T's forecasts of its revenues contained in its D&J and questions the validity of AT&T's forecast that revenues from its 800 Service (Canada) will increase by $6.674 million as a result of this transmittal. *Id.*

[2] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873 (1989) *(Price Cap Order)*.

[3] Letter from C. E. Link, Administrator-Rates and Tariffs, AT&T Communications, to Chief, Tariff Division, FCC, Oct. 2, 1989.

[4] On a service-specific basis, total revenue divided by total quantity is, by definition, average revenue for that service. Since total revenue equals price times total quantity, total revenue divided by total quantity is also price. Thus, price equals average revenue.

[5] AT&T Communications, Revisions to Tariff F.C.C. No. 9, Transmittal No. 1690, 4 FCC Rcd 6833 (1989).

[6] AT&T Communications, Revisions to Tariff F.C.C. No.1, Transmittal No. 1762, DA 89-1523, released Nov. 29, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-218

In the Matter of

Amendment of Section 73.202(b),	RM-4936
Table of Allotments,	RM-5014
FM Broadcast Stations.	RM-5211
(Newport, Kingsport,	RM-5530
Colonial Heights,)	RM-5531
and Gray, Tennessee)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 20, 1989; Released: December 7, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 51 FR 21777, June 16, 1986, seeking comments on three mutually exclusive proposals for the allotment of Channel 225A to either Newport, Kingsport or Colonial Heights, Tennessee. The *Notice* was issued in response to three separate petitioners: 1) WNPC, Incorporated ("WNPC"), licensee of daytime-only AM Station WNPC, Newport, Tennessee, seeking the allotment of Channel 225A to Newport, as that community's first local FM service (RM-4936); 2) J.T. Parker Broadcasting ("J.T. Parker"), licensee of daytime-only AM Station WGOC, Kingsport, Tennessee, proposing the allotment of Channel 225A to Kingsport, as that community's third local FM service (RM-5014); and 3) Murray Communications ("Murray"), seeking the allotment of Channel 225A to Colonial Heights, as that community's first local FM service (RM-5211).

2. In response to the *Notice*, Murray[2] and Gary Mason ("Mason") filed counterproposals requesting the allotment of Class C2 Channel 225 to Colonial Heights (RM-5530) or Gray, Tennessee (RM-5531), respectively.[3] WNPC, J.T. Parker and Murray filed comments reiterating their intention to apply for the channel at their respective communities. Holston Valley Broadcasting Corporation ("Holston"), licensee of Station WKPT(AM), WTFM(FM) and WKPT-TV at Kingsport, Tennessee, filed comments in support of the Newport proposal. Covenant Broadcasting Corporation ("Covenant"), licensee of Station WORQ(AM) at Colonial Heights, submitted a letter in support of the allotment of Channel 225A to Colonial Heights.[4] Murray, J. T. Parker, WNPC and Holston filed reply comments.[5]

COUNTERPROPOSALS

3. Murray, in its counterproposal, requested the allotment of Channel 225C2 at Colonial Heights in lieu of its previously requested Class A allotment. In order to accomplish the Class C2 allotment at Colonial Heights, Murray suggests two optional proposals, both requiring the deletion of Channel 224A at Abingdon, Virginia.[6] First, Murray suggests the substitution of Channel 263A for Channel 224A at Abingdon, Virginia, and imposition of a site restriction on Channel 264A at Banner Elk, North Carolina. Second, Murray suggests the substitution of Channel 297A for Channel 224A at Abingdon, which also requires the substitution of Channel 263A for vacant but applied for Channel 297A at Lebanon, Virginia.

4. Mason suggests that in lieu of the proposals set forth in the *Notice* Channel 225C2 be allotted to Gray, Tennessee, as that community's first local FM service. Mason supports the substitution of Channel 263A for Channel 224A at Abingdon in order to accomplish the allotment of Channel 225C2 to Gray.

COMMENTS

5. Murray, in its comments, states that the Kingsport proposal would not provide the required city grade signal over the area within the boundaries of Kingsport. Murray argues that its proposal for the Class C2 facilities represents a more efficient use of available spectrum than the Class A proposal at either Newport or Kingsport. Murray asserts that the Colonial Heights proposal is superior and should be preferred over the other proposals.

6. Holston argues that the rugged mountainous terrain found throughout eastern Tennessee virtually makes it impossible for the predicted contour of Channel 225A to provide the required 70 dBu coverage at either Kingsport or Colonial Heights, with the imposition of a site restriction.

7. WNPC, in its comments, contends that the Kingsport proposal is technically deficient because the site restriction specified in the *Notice* would not permit the required city-grade signal over Kingsport. WNPC submitted an engineering showing in support of its contention. WNPC also claims that Colonial Heights is not a "separate and independent" community but rather a "bedroom community" of Kingsport. It further claims in comparison that the allotment to Newport would provide a fair, efficient and equitable distribution of radio service among the communities.

8. In reply comments, Murray continues to support the allotment of either Channel 225A or Channel 225C2 to Colonial Heights. Murray states that the Class A station at Colonial Heights will provide a predicted 70 dBu service contour over the community.

9. J. T. Parker in its reply comments argues that the Kingsport proposal should receive preference over the other proposals based on a population comparison.

DISCUSSION

10. We have determined that the counterproposal for the allotment of Channel 225C2 at Gray is unacceptable. The allotment of Channel 225C2 cannot be made in compliance with the Commission's minimum spacing requirements due to a short spacing to Station WABN-FM, Channel 224A at Abingdon, Virginia. Although Mason

suggested Channel 263A as a substitute for Channel 224A at Abingdon, that channel would create a short spacing to Channel 264A at Banner Elk, North Carolina. Mason did not address this short spacing. Accordingly, his petition is unacceptable for consideration.[7]

11. As stated in the *Notice*, the proposals were mutually exclusive because the distance between the communities was less than the required mileage of 105 kilometers (65 miles) for Class A co-channel allotments at Newport, Kingsport and Colonial Heights. Therefore, Channel 225A could only be allotted to one of the three communities. Initially Channel 225A was the only channel available for allotment at these communities. However, the Commission has simultaneously allotted Channel 290A to Colonial Heights in a separate proceeding.[8] In view of this action, Murray's interest in allotment of a channel to Colonial Heights, either Class A or Class C2, has been satisfied. Therefore, and in view of the fact that allotment of this alternate channel makes possible the use of Channel 225A at other locations, we will not further consider Murray's request.

12. Based on further engineering analysis, we find that the proposed allotment of Channel 225A at Kingsport is technically deficient. Channel 225A at Kingsport cannot be sited and provide a city-grade signal over the entire principal community to be served in accordance with Section 73.315(a) of the Commission's Rules. Thus the Kingsport proposal shall be denied. Therefore, we need only consider the Newport proposal.

13. We conclude, after careful consideration of all the information before us, that the public interest would be served by allotting Channel 225A to Newport, Tennessee, as that community's first local FM service. The channel can be allotted to Newport, in compliance with the Commission's minimum spacing requirements.[9]

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 22, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Newport, Tennessee	225A

15. The window period for filing applications will open on **January 23, 1990,** and close on **February 22, 1990.**

16. IT IS FURTHER ORDERED, That the petitions of Murray Communications (RM-5211 and RM-5530), proposing the allotment of either Channel 225A or 225C2 to Colonial Heights, Tennessee, ARE HEREBY DENIED.

17. IT IS FURTHER ORDERED, That the petition of Gary Mason (RM-5531), proposing the allotment of Channel 225C2 to Gray, Tennessee, IS HEREBY DISMISSED.

18. IT IS FURTHER ORDERED, That the petition of J.T. Parker (RM-5014), proposing the allotment of Channel 225A to Kingsport, Tennessee, IS HEREBY DENIED.

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

20. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Gray, Tennessee, has been added to the caption.

[2] Murray also filed a Petition for Reconsideration of the *Notice* and a Petition for Stay of this proceeding until the disposition of its Petition for Reconsideration filed in MM Docket No. 85-258. The Commission's rules do not allow for the filing of a petition for reconsideration of an interlocutory action. Accordingly, the Petition for Reconsideration will be denied. As for the Petition for Stay, the Commission recently denied Murray's petition for reconsideration in MM Docket No. 85-258. *See Memorandum Opinion and Order* adopted November 15, 1989. Therefore, the petition for stay is moot.

[3] Public Notice of the counterproposals was given on August 12, 1986, Report No. 1609.

[4] The Covenant letter was not timely filed as comments nor was it accompanied by a certificate of service. Therefore, in accordance with Sections 1.415 and 1.420 of the Commission's Rules we shall not consider the letter.

[5] In addition, motions for leave to file corrected certificate of services were filed by WNPC and Mason. Murray filed supplemental reply comments, to which J. T. Parker filed a motion to strike. In reviewing the late-filed supplemental reply comments we find that Murray responded to issues raised in reply comments. The pleading cycle does not permit such responses. Therefore, in accordance with Section 1.415(d) of the Commission's Rules the supplemental reply comments will not be considered.

[6] Station WABN-FM is licensed to operate on Channel 224A at Abingdon, Virginia. Therefore, in accordance with the Commission's established policy, Station WABN-FM would be entitled to reimbursement for changes in its facilities by parties benefitting from the proposed change.

[7] In addition, we note that, in his counterproposal, Mason failed to include a commitment to reimburse the Abingdon station for any reasonable expenses it might incur in changing channels, and failed to serve timely the licensee at Abingdon. Although Mason subsequently attempted to remedy these defects by filing an untimely pleading, in accordance with Sections 1.415 and 1.420 of our rules, we will not consider this counterproposal. Moreover, even if we were to consider the proposal on its merits, it appears that Gray should be considered a "quiet village" such that a first local FM service to the much larger community of Newport would be preferred.

[8] *See Report* and Order in MM Docket No. 86-237, adopted November 15, 1989.

[9] The reference coordinates are 35-57-54 and 83-11-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-551

In the Matter of

Amendment of Section 73.202(b), RM-7015
Table of Allotments,
FM Broadcast Stations.
(Clarksdale and Water Valley,
Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 17, 1989; Released: December 7, 1989

By the Chief, Allocations Branch:

1. Before the Commission is a petition for rule making filed by Sunflower Broadcasting Co., Inc. (petitioner), requesting the substitution of FM Channel 268C3 for Channel 269A at Clarksdale, Mississippi. Petitioner also requests modification of its license for Station WWUN(FM), to specify operation on the higher class channel. Petitioner submitted information in support of the proposal and stated its intention to file an application for Channel 268C3.

2. Channel 268C3 can be allotted to Clarksdale, Mississippi, in compliance with minimum distance separation requirements of the Commission's Rules, at petitioner's specified site, provided Channel 268A is deleted at Water Valley, Mississippi.[1] An application for Channel 268A has been filed by Sharing The Word of God Ministries (88040MA). Petitioner has proposed the substitution of FM Channel 288A for Channel 268A at Water Valley. The proposed substitution at Water Valley can be accomplished in compliance with the minimum distance separation requirements of the Commission's Rules at the applicant's site or at the allotment site coordinates.[2] Sharing The World of God Ministries would be permitted to amend its application to specify Channel 288A and retain its cut off protection, since the channels are equivalent.

3. As for the proposed Clarksdale upgrade, we shall propose to modify the license of Station WWUN(FM) to specify operation on Channel 268C3, in accordance with Section 1.420(g) of the Commission's Rules.

4. In order to provide a wide coverage area station for Clarksdale, Mississippi, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Clarksdale, Mississippi	243A, 269A, 292A	243A, 268C3, 292A
Water Valley, Mississippi	268A	288A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 29, 1990,** and reply comments on or before **February 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

U. J. Gilbert, President
Sunflower Broadcasting Co., Inc.
P.O. Box 1475
Clarksdale, Mississippi 38614

7. IT IS FURTHER ORDERED, That the Secretary of Commission SHALL SEND BY CERTIFIED MAIL, Return Receipt Requested, a copy of this order to applicant for Channel 268A at Water Valley:

Sharing The Word of God Ministries, Inc.
P.O. Box 716
Bruce, Mississippi 38915

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 268C3 at Clarksdale are 34-18-00 and 90-32-30.

[2] The coordinates for Channel 288A at Water Valley at the applicants site are 34-07-01 and 89-38-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Security Emergency
Preparedness Telecommunications
Service Priority System

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1989; Released: December 8, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By Report and Order (*Order*) in Gen. Docket No. 87-505, 3 FCC Rcd 6650 (1988), the Commission adopted revisions to Sections 64.401 and 64.402 (and Appendices A and B thereto) of the Commission's Rules and Regulations, 47 C.F.R. §§ 64.401, 64.402, which dictate the procedures for the restoration of vital private line services during emergency situations and establish a "Precedence System for Public Correspondence Services." The proceeding was initiated by a Notice of Proposed Rule Making, 2 FCC Rcd 7124 (1987), in response to a petition filed by the Secretary of Defense in his capacity as the Executive Agent for the National Communications System (NCS).[1] By its petition, NCS proposed to replace the existing Restoration Priority (RP) rules with a new National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System, which has a broader scope and applicability.[2] NCS argued that adoption of the rules was necessary to (1) authorize and require telecommunications service vendors to provide priority treatment to NSEP telecommunication services, (2) ensure such vendors are not in violation of the Communications Act of 1934 when doing so (*i.e.*, not engaging in any unlawful discrimination or undue preference) and (3) override any existing contractual provisions inconsistent with the rules promulgated.

2. In response to comments filed by a broad range of interested parties, the Commission adopted changes to its rules, essentially following the proposals submitted by NCS and resolving legal questions concerning the authority delegated to NCS to implement the TSP System. It also adopted procedural changes in the rules in order to foster more effective administration of the TSP System. *See Order* at Appendix. A number of parties expressed the concern that certain provisions in the rules could allow NCS to engage in substantive Rule Making. In its discussion of delegation of Rule Making authority to NCS, the Commission stated that it would review NCS' proposed procedural guidelines to determine whether they contain matters warranting a Rule Making proceeding. *Id.* at para. 35. The Commission delegated authority to the Chief, Common Carrier Bureau (Bureau) to resolve, in the first instance, all related substantive and procedural issues. *Id.*, n. 15. On July 14, 1989, NCS submitted a Petition for Declaratory Ruling (Petition) seeking approval of its TSP System implementation guidelines and procedures: NCS Directive (NCSD 3-1), the TSP Service Vendor Handbook (NCSH 3-1-2), and the TSP User Manual (NCSM 3-1-1). Public notice of these documents was published on July 20, 1989, DA 89-846, and comments were filed by thirteen parties.[3] The NCS Petition presents two basic issues: (1) whether the guidelines and procedures submitted by NCS contain any improper delegation of Rule Making authority to NCS; and (2) whether the guidelines and procedures otherwise conflict with Commission rules or policies. For the reasons discussed below, the Bureau finds that the documents submitted for review contain essentially administrative rules and standards properly within the realm of NCS' delegation of authority, and that nothing in them appears to conflict with any Commission rules or policies. The Bureau therefore approves NCS' TSP System implementation guidelines and procedures.

II. POSITIONS OF THE PARTIES

3. *Comments*. The comments demonstrate general support for the NCS documents. *See, e.g.*, BellSouth Comments at 2, AT&T Comments at 2, AAR Comments at 1, Bellcore Comments at 2, US West Comments at ii, USTA Comments at 3, UTC Comments at 2. GTE also supports NCS' submissions, stating that "[t]here is a definite need for a priority system to be used to coordinate all the NSEP needs of the country -- including interstate, foreign and intrastate services." GTE Comments at 2.

4. UTC, which represents over 2,000 electric, gas, water and steam utilities that rely on extensive proprietary communications systems as well as common carrier circuits to assure uninterrupted provision of public utility service, states that it finds the procedures of all three documents in accord with the Commission's TSP requirements. UTC emphasizes the need for NCS and the Commission to exercise oversight responsibilities to ensure that flexibility in priority assignment procedures is optimized. UTC Comments at 3. UTC expresses concern, however, over the procedures as they relate to private communications systems. UTC suggests that, under Section 4.a(2) of the Appendix to Part 64 of the rules and Section 9.4 of the Vendor Handbook, p. 9-2, there is some ambiguity as to a private system operator's ability to restore his own service without a valid TSP assignment where there is a TSP-prioritized service intermingled with the private service. It notes that Section 9.1 of the Vendor Handbook, p. 9-1, permits common carrier service vendors to provision and restore any service critical to the integrity of that service vendor's own network. UTC Comments at 4-5. To reconcile these purported inconsistencies, UTC suggests that Section 9.1 be amended to add language to clarify that private system operators retain the right to provision or restore their own critical circuits without the need to request formal TSP assignments.

5. UTC also states that Section 8.3 of the User Manual, p. 8-5, indicates that a TSP sponsoring agency should return a denied sponsorship request to the service user along with a reason for the refusal, and that a non-federal government service user must appeal priority actions through its sponsor. UTC asks whether a non-government service user should be permitted to appeal directly to the TSP Program Office. Finally, UTC asks that the Directive, Section 10(f) of the Appendix, be clarified to reflect that DOE may sponsor intrastate utility priority requests.

6. ARINC, which describes itself as the communications company of the air transport industry, generally approves the procedural guidelines, but suggests four areas of concern that it says could affect the authorization and retention of priority treatment for services needed for NSEP. First, ARINC argues that the User Manual lacks the procedures needed for private entities to obtain priority assignments and appeal adverse actions from sponsors. It asserts that NCS has sub-delegated administrative responsibilities to sponsors that will not be fully subject to NCS' procedures to ensure fair and non-discriminatory treatment of private TSP users. Second, ARINC complains that the FCC has not established deadlines for its response to appeals regarding NCS priority decisions, and suggests that any appeal serve as an automatic stay of adverse NCS or sponsorship action pending a final FCC decision. ARINC also suggests a 30 day sponsoring agency response requirement for service user priority requests and direct appeal to NCS should a sponsor or the TSP Program Office deny a request for priority assignment. Third, ARINC asserts that the guidelines do not sufficiently describe the procedures by which priority assignments will be revalidated. ARINC states that "NCS must not be permitted arbitrarily to revoke and rescind priority assignments." ARINC Comments at 2. Fourth, ARINC states that the Directive does not adequately restrict NCS' Rule Making authority, particularly regarding Rule Making authority more appropriately left to the FCC. ARINC suggests that the Directive, Section 13(c) of the Appendix, reserves to NCS the right to issue supplemental rules, including substantive rules. ARINC Comments at 11-12. ARINC adds that NCS has not made a commitment to allowing effective and representative industry participation in the TSP Oversight Committee. ARINC Comments at 3.

7. MCI, for its part, suggests that Section 5.0 of the User Manual appears incomplete, not making clear that invocation of NSEP treatment is not a justification *per se* for "non-competitive procurements."

8. AT&T states that it strongly supports the subject submissions. AT&T Comments at 2. It urges that delay be minimized, suggesting that the rules and guidelines calling for an Oversight Committee will facilitate resolution of problems which may arise under the program. For example, it suggests that one improvement that could be introduced would be clarifying the meaning of NCS' "supplemental procedures" regarding the role of state governors as "authorized invocation officials" under Section 6.b(2)(j) of the Appendix. AT&T also questions the limitation on the officials to whom invoking authority may be delegated, and the fact that the guidelines give governors no authority to regulate priorities over purely intrastate services. *Id.* at 4. Finally, AT&T urges that the guidelines be viewed as living documents, adaptable and responsive, with the FCC providing guidance on special procedures needed to accommodate change.

9. US West suggests that Section 12.a(3) of the rules, which establishes priority levels over three time periods, does not address how priorities for the second two periods are assigned. The Directive, US West continues, seems to imply that the service vendor has an obligation to track multiple priority level assignments, a responsibility not appropriate for service vendors. Directive at 4; US West Comments at 7. US West offers language that would require vendors to retain only the TSP priority for the current time period, with later, i.e., contingent, priority requests the responsibility of the user.

10. With regard to the Vendor Handbook, US West seeks clarification concerning the meaning of "completion" in Section 6.f(7)(c) of the Appendix, suggesting that language be used in the Vendor Handbook at 6-1 to make it clear that "prime service vendors are required, by the FCC's TSP System rules, to confirm all completed TSP order activity, for that portion of the service they have contracted to supply, to the TSP Program Office." US West Comments at 9. US West also questions whether the vendor is required to track the presence of a TSP authorization code or a definitive statement in the "remarks" section of the user's order, as suggested by Vendor Handbook at Appendix F, F-3, where there had been an RP priority. US West offers alternative language in the Vendor Handbook to clarify that vendors will not accept orders for changes to existing RP circuits after implementation of TSP without the proper authorization code or definitive removal statement, and in the User Manual to require the user to include such information in orders to remove RP assignments. US West suggests prohibiting service users from using the designation "00" to remove an RP assignment. US West Comments at 12. With regard to notification of revocation of emergency priorities, US West notes that the User Manual and Vendor Handbook are inconsistent. It suggests that both should state that the vendor will not engage in automatic revocations and specify who will be communicating with the vendor and that such communications must be in writing. *Id.* at 14. Finally, US West asks that the User Manual and Vendor Handbook refer to the procedures used by Bell Operating Companies to resolve problems with provisioning or restoral of authorized NSEP services. It suggests that these escalation procedures, which are coordinated through the Bellcore Point of Contact, are sufficiently related to warrant inclusion in the procedural documents.

11. BellSouth concurs in NCS' submissions, with one exception. It suggests that because some local exchange companies premise their billing and reconciliation systems on the twelve character TSP authorization codes discussed at pp. 4-3 and 5-3 of the Vendor Handbook, it should be mandatory rather than permissive that the primary service vendor deliver to the subcontractor (local exchange company) the twelve digit numbers (characters) which identify the circuits to be prioritized or restored. Bellcore shares BellSouth's views. Bellcore Comments at 2.

12. AAR, which represents railroads operating in the United States, Canada and Mexico, works with the Military Traffic Management Command which controls and operates the Defense Freight Railway Interchange Fleet, and the Peacekeeping Rail Garrison, which provides a highly survivable strategic weapon system. Communications, it states, are critically important to these and its members' other train operations. AAR further states that it supports the principle of sponsoring federal organizations set forth in the guidelines, but suggests that guidance be provided as to where industries that are of widespread nature, such as railroads, should go to seek federal sponsorship. AAR Comments at 3.

13. In its comments submitted in response to the Commission's Public Notice, NCS states that the User Manual and Vendor Handbook are not subject to Privacy Act provisions because the TSP forms do not solicit personal information from the public and no information stored in the TSP Management Information System "is accessible by use of a personal identifier." NCS Comments at 3. NCS

continues that use of the User Manual and Vendor Handbook do not present a possibility of an unwarranted invasion of the privacy rights of individuals. Therefore, it is deleting the Privacy Act statement from all TSP forms and documents contained in the Vendor Handbook and the User Manual. Also, because information regarding the burden for collecting information must be included on each TSP form, the forms are being revised. Each form, NCS notes, will be made available to the public by the Government Printing Office/Federal Supply Service. Once approved by the Office of Mangement and Budget, NCS says, the User Manual and the Vendor Handbook and the eight associated TSP forms will be revised, and copies of the forms substituted for those currently in Appendix D of the Vendor Handbook and the User Manual.

14. *Replies*. McCaw, a supplier of cellular telecommunications service, supports the guidelines and encourages expeditious implementation of TSP. It does, however, seek clarification of one issue. It suggests that references in the Vendor Handbook can be construed to indicate that telecommunications service vendors have the option of declining to provide NSEP services, despite the "shall maintain and provision and . . . restore" language of Section 64.401 of the Commission's rules, and additional language in Section 1.b of the Appendix. This, McCaw says, is inconsistent with portions of the Vendor Handbook which, for example, provide what vendors must do "if they accept an order for a TSP service." McCaw Comments at 4. McCaw asserts that these references imply that service vendors are free to accept or decline a TSP service order. Thus, McCaw asks that the Commission clarify whether service vendors may deny TSP service orders, and invoke the needed corrections in the Vendor Handbook.

15. In its reply, Pacific, like AT&T, states that it expects the Oversight Committee to resolve difficulties that may develop under the TSP program. Pacific Comments at 2.

16. NCS endorses use of the TSP Oversight Committee for resolving minor remedial problems, which it states will be facilitated by its broad representation. In response to AT&T's concern with regard to supplementary procedures and authority to invoke, NCS states that the User Manual does not allow a governor to delegate authority to any other official, and NCS does not intend to publish additional TSP documents. NCS Reply at 5. As to MCI's comment that the User Manual should not be used as a justification for non-competitive procurement, NCS notes that the User Manual recognizes the variability of procurement procedures among service user organizations, and it is not intended to have any bearing on such procedures. Service users are bound by the existing procurement laws and regulations when obtaining telecommunications service and "[n]othing in the Service User Manual can change that requirement." *Id*. at 6. Moreover, NCS continues, there is no risk in not addressing the matter of procurement in the User Manual because government agencies will not look to it for guidance on procurement requirements. *Id*.

17. On the matter raised by US West regarding tracking multiple or contingent assignments, NCS notes that Section 10.7 of the User Manual states that "Industry capability does not currently support the ability to retain multiple priorities for a single service . . . ." Moreover, there is no mention of a service vendor responsibility to retain or track multiple priority assignments for a single service in the Vendor Handbook, NCS states. *Id*. With regard to US West's suggestion that the completion confirmation language of the Vendor Handbook, Section 6.1, could be interpreted to apply only to provisioning activities, NCS states that service vendors are required to confirm completion of all TSP service orders for which they are the prime service vendor. NCS observes that the term "provisioning" in that context is meant to include any activity, and it expresses willingness to delete the words "of provisioning" from the Vendor Handbook statement to clarify the matter. *Id*. at 7. As to US West's comment on a discrepancy in the use of the "00" designation between the User Manual and the Vendor Handbook, NCS states that the procedure described in the Vendor Handbook is correct, *viz*., service users should not use the "00" designation to remove an RP assignment. NCS proposes to change the User Manual, Section F.1, Submitting RP Certification For TSP Assignments, last paragraph, to read as follows:

> Following the IOC date, service users may not submit a service order to a service vendor regarding an existing RP circuit without either a TSP Authorization Code or a definitive statement in the "remarks" section of the order to remove the RP assignment. Service users may not use the designation "00" (zero zero) on the service order to remove the RP assignment.

Id. at 9. NCS does not recommend US West's alternative language.

18. As to US West's suggestion regarding inclusion in the User Manual and the Vendor Handbook of steps to be taken regarding revocation of service, NCS states that the Vendor Handbook does not discuss automatic revocation because a service vendor is only authorized to remove or change a priority assignment when so instructed by the user via a service order or to resolve a discrepancy. NCS concludes that the explanation in the User Manual is sufficient and no mention is needed in the Vendor Handbook. Finally, NCS states that while the term "escalation" is not specifically mentioned in the guidelines, Sections 8.0 and 8.2 of the Vendor Handbook address this matter. Section 8.2 suggests that internal solutions be attempted first, with assistance from the National Coordinating Center, NCS and the FCC as needed.

19. In response to UTC's argument that private vendors should not be required to seek priorities for their own circuits simply because a lessee of their system may be interconnected with a common carrier to which a priority has been issued, or that a private system operator should be permitted to restore his own service without a valid TSP assignment, NCS notes that a utility is free to lease or not lease a service, on its private network but in agreeing to do so it becomes a TSP service vendor and is bound by the TSP System rules. NCS states that the operator of such a private system cannot give preferential treatment to its own internal service requirements above that granted to a third party's TSP service. In short, NCS says, "[a]ny service on that network with a TSP Authorization Code must have priority over a service without one (with the sole exception of exempt control services and orderwires)." NCS Reply at 12. NCS concludes that the language suggested by UTC would be at variance with the rules. With regard to UTC's concern about a service user's right to appeal a sponsoring organization's refusal to sponsor or its denial of a priority request, NCS asserts that the current provisions for alternative sponsorship, including availabil-

ity of the TSP Program Office and the FCC, are adequate. Also, NCS confirms that under the Directive, and the User Manual, 8.1, the Department of Energy is not precluded from sponsoring an intrastate utility request for priority. As to AAR's recommendation that the Department of Transportation be specifically required to sponsor railroads, NCS states that the current provisions, including Executive Order 12656, provide adequate sources for determining a logical sponsor.

20. NCS strongly disagrees with ARINC's proposal that private service users should normally be able to request priority assignments directly from the TSP Program Office. NCS states that the Program Office and NCS generally rely upon the expertise of the federal agencies to assure that non-federal requests satisfy valid NSEP requirements. As to imposition of a 30-day response period for sponsoring federal agencies, NCS notes that the User Manual, 8.3, states that sponsors "should keep their processing time for TSP requirements to two working days or less." NCS Reply at 16-17. NCS suggests it is not clear when the 30-day clock would begin to run and, in any event, with the exception of four agencies, sponsorship is a volunteer activity by a federal agency that would be difficult to enforce. Moreover, it says, the availability of the TSP Program Office as a "last resort" sponsor and the appeal process described at Sections 8.3 and 9.1 of the User Manual should suffice.[4] NCS also states that the administrative procedures adopted by each sponsoring agency are not substantive in nature, and the Oversight Committee will be convened to hear complaints of TSP service users and vendors. In sum, NCS urges the Commission not to change the TSP guidelines concerning sponsorship. NCS notes that if the FCC disapproves a TSP assignment it will inform the TSP Program Office which will then instruct the service user of the change in the assignment and the requirement of the service user to issue a new service order to the service vendor. A similar procedure, NCS continues, takes place if the TSP Program Office changes an assignment. NCS suggests that if this process were disrupted every time an appeal is lodged with the FCC and a stay issued pending a decision, the effectiveness of the TSP System would be "unnecessarily compromised." *Id.* at 18. On the matter of revalidation, NCS submits that the appeal process in place is adequate to address any allegations of unfairly downgraded priorities. Finally, with regard to substantive Rule Making, NCS asserts that the TSP guidelines are supplemental and consistent with the Commission's *Order* which "has already protected against 'substantive Rule Making' by the NCS." *Id.* at 19. The NCS "does not believe additional restrictions are required to ensure adequate NCS administration of a program originally conceived by the NCS to be responsive to the concerns of all NSEP service users." *Id.*

III. DISCUSSION

21. The NCS Petition presents two key issues: (1) whether the TSP System implementation guidelines and procedures contain provisions which constitute delegation of Rule Making authority to NCS inconsistent with the standards discussed in the Commission's *Order* and (2) whether any provisions in the documents otherwise violate Commission policies or rules.

22. The Commission stated in its *Order* that it is neither appropriate nor possible for the Commission to delegate to the Executive Office of the President (EOP), *i.e.*, NCS, or others, the ultimate authority for determining whether preferences granted under the TSP System are unlawful. *See Order* at para. 28. The Commission also stated, however, that it does not view delegation of administrative responsibilities for TSP implementation as an inappropriate delegation of authority, particularly in light of the essentially ministerial nature of the initial priority assignment process, and given the RP precedent. *Id.* It added that, in order to implement a reasonably efficient and effective TSP System, NCS must be afforded some procedural latitude. *Id.* at para. 35. The consensus of the commenters in this proceeding is that the documents submitted represent an effective, flexible first step toward implementation of TSP. We agree. Moreover, we do not find that the NCS documents improperly delegate Rule Making authority to NCS. Indeed, only one party, ARINC, even suggests that the Directive does not adequately restrict NCS' Rule Making authority. With respect to specific provisions contained in NCS' procedures and guidelines, we find no conflict between them and any Commission rule or policy. We address below in more detail certain concerns expressed by the parties in an effort to foster the efficacious implementation of this important TSP process.[5]

23. As noted above, ARINC suggests that the Directive has reserved to NCS the right to issue supplemental rules, including substantive rules, and states that NCS has not made a commitment to allow effective, representative industry participation in the TSP Oversight Committee. NCS, in turn, asserts that its documents are consistent with the Commission's *Order*, which limited NCS to procedural and ministerial activities. *Order* at para. 35. There is nothing apparent in the NCS documents suggesting that NCS has embarked on substantive Rule Making or that it believes that it may do so.[6] In fact, NCS has expressed its desire to comply with the limitations expressed in the Commission's *Order*. The Commission will continue to monitor the TSP program and procedural rules issued by NCS.

24. As to industry representation on the Oversight Committee, we note that the Federal Advisory Committee Act, 5 U.S.C. Appendix, Pub. L. 92-463, 86 Stat. 770 (1972), and Executive Order 12024 (42 Fed. Reg. 61445, 3 CFR, 1977 Comp., p. 158) requires that Committee representation include members of all interested organizations. The purpose of the TSP Oversight Committee will be to resolve administrative and procedural issues and controversies that develop in day-to-day TSP System operation. Its function will be especially important during the initial stages of implementation as affected parties, including vendors and users, adjust to new requirements and procedures. The TSP Oversight Committee should not be viewed as a surrogate for administrative procedures established by the rules, however, such as priority assignment appeal. We look to the TSP Oversight Committee, with its broad constituent representation, including a non-voting Commission representative, to play an important role in smoothing the TSP System process.

25. UTC asks whether private service vendors are restricted as to their right to provision or restore their own critical circuits where such circuits are mingled with leased common carrier circuits that have been issued a TSP priority. The essential purpose of TSP is to provide

an orderly and consistent process by which NSEP services may be provisioned or restored. The scope of TSP contained in Section 4.a(2) of the rules states that services which are provided by government and/or non-common carriers and are interconnected to common carrier services assigned a priority level are subject to TSP System rules. One such rule, Section 64.401, *requires* common carriers to comply with TSP policies and procedures.[8] There is nothing in the TSP rules that prevents a private system owner from establishing any restoral or provisioning priority program it determines is necessary, provided there is no impact on NSEP TSP. But by making the decision to contract or lease services on its private system to a common carrier, which must provide TSP service under Section 4.a(2), an affirmative choice has been made to subordinate, to the extent necessary, decisions regarding private system restoration or provisioning to TSP System requirements. Any other interpretation would subrogate TSP to non-NSEP procedures and priorities and undermine the goals of the TSP process.[9] To the extent operational conflicts or anomalies do arise, however, UTC or others may bring them before the Oversight Committee, discussed *supra*.

26. Several parties, including AAR, ARINC, Bellcore, BellSouth, US West and UTC, raise questions concerning, *inter alia*, the adequacy of current procedures associated with securing a sponsor, curing allegedly incorrect priority assignments, matters involving permissive or mandatory sponsoring by federal agencies, multiple tracking [contingent] assignments, and responding to appeals. They also raise questions regarding revalidation guidelines, TSP authorization code sequences, and other operational or administrative/procedural issues. NCS has clarified or modified certain procedures and guidelines in response to the comments filed. Additionally, we believe, as NCS suggests, that the existing provisions for sponsorship and appeal are adequate to assure reasonable availability and review. Although we anticipate that with implementation of TSP priority assignments a variety of operational problems will surface, we are confident such problems can be resolved satisfactorily through existing mechanisms, including the TSP Oversight Committee. The purpose of the Committee will be to address these kinds of operational issues and, if necessary, to recommend revision of TSP rules or procedures. We therefore do not need to take action on these matters now.[9]

IV. CONCLUSION

27. Based on the comments submitted, we find that the Directive, the Vendor Handbook and the User Manual contain no provisions which exceed the limitations on delegated authority imposed on NCS by the Commission. We also find that these documents do not, on their face, violate any other Commission policy or rule. NCS' Petition will therefore be granted. NCS may proceed with any minor amendments[10] to its documents consistent with Commission policies.

V. ORDERING CLAUSE

28. Accordingly, NCS' Petition for Declaratory Ruling is GRANTED, and the NCS Directive 3-1, Service Vendor Handbook (NCS Handbook 3-1-2), and Service User Manual (NCS Manual 3-1-1) are HEREBY APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See Order* at para. 1, n. 1, for a list of NCS members and designation of the Secretary of Defense as Executive Agent for the NCS.

[2] For a description of the background of the RP System, *see id.* at para. 2.

[3] Comments were filed by Aeronautical Radio, Inc. (ARINC), Association of American Railroads (AAR), American Telephone and Telegraph Company (AT&T), Bell Communications Research, Inc. (Bellcore), BellSouth Telephone Companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth), GTE Service Corporation (GTE), MCI Telecommunications Corporation (MCI), NCS, United States Telephone Association (USTA), Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West) and Utilities Telecommunications Council (UTC). Reply comments were submitted by McCaw Cellular Communications, Inc. (McCaw), NCS, and Pacific Bell and Nevada Bell (Pacific).

[4] *See also* Section 6.e of the rules.

[5] The delegation of authority to the Bureau is, by its own terms, sufficiently broad to encompass all matters addressed herein. We anticipate that in the future most administrative and procedural questions will be addressed in the first instance through the participative process engendered by the Oversight Committee, which NCS is currently creating.

[6] NCS may only develop substantive rules that are effective after invocation of 47 U.S.C. §706.

[7] McCaw's concern that provisions of NCS' documents may be interpreted to permit vendors to deny TSP service orders is readily resolved by this section. As the Commission stated at para. 24 of the *Order*, carriers are not required to include services under TSP that they cannot provide. However, Section 4.a(2) makes it clear that TSP is not otherwise permissive in nature.

[8] The lessor of any such service should, pursuant to TSP rules, be notified of any current or subsequent priority assigned. *See* Section 6.f(5). Additionally, private carriers may be bound to TSP rules strictly by contract with users. *See* Section 4.c. Private carriers may always restore orderwires independent of TSP priorities, just as any common carrier subject to TSP. *See* Section 4.b.

[9] Similarly, MCI's concern regarding use of the NCSM for non-competitive procurement is more properly raised outside the context of TSP. If an incident arises which requires an institutional solution, it should be addressed in the first instance by the Oversight Committee. With its broad participatory constituency, including state representatives, the Committee also is better equipped to address AT&T's concern regarding those entities that are delegated authority by NCS, pursuant to Section 9.c of the rules, to invoke TSP.

[10] A minor amendment is one which does not violate the limitations on delegation of authority as described herein and in the Commission's *Order*, or any other Commission policy or rule.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver of Section
74.1231 of the Commission's Rules
for W276AQ, Fort Lee, NJ

ORDER EXTENDING TIME

Adopted: September 18, 1989;Released: September 19, 1989

By the Chief, Mass Media Bureau:

1. On August 3, 1989, the Commission issued a Public Notice, DA 89-933, requesting comment on the above-referenced waiver request filed by Gerard Turro. Initial comments were due September 5, 1989, and the last date for filing reply comments was set for September 20, 1989. On September 12, 1989, Turro filed a request to extend the period for filing reply comments for two weeks, from September 20, 1989, to October 4, 1989. Turro stated that he required the extension in order to investigate and reply to specific factual allegations made in the initial comments.

2. Since Turro initially requested the waiver, and is the party now seeking additional time to file reply comments, it does not appear that he or any other commenting party would be unfairly prejudiced by delaying the disposition of the waiver proceeding by granting the requested two week extension of time for filing reply comments.

3. ACCORDINGLY, it is ORDERED, pursuant to authority of Section 0.283 of the Rules and Sections 4(i), 4 (j), and 303 of the Act, That the period for filing reply comments on the above-captioned waiver request IS EXTENDED from September 20, 1989, to October 4, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-559

In the Matter of
Amendment of Section 73.202(b), RM-6351
Table of Allotments,
FM Broadcast Stations.
(Aberdeen, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 22, 1989; Released: December 8, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KAYO Broadcasting (petitioner), licensee of Station KAYO(FM), Channel 257A, Aberdeen, Washington, seeking the substitution of Channel 257C1 for Channel 257A and modification of its station license to specify operation on the higher class co-channel.[1] Petitioner states it will effectuate the Class C1 service as expeditiously as possible, if granted.

2. The channel substitution can be made consistent with the Commission's minimum distance separation requirements to all domestic allotments at the petitioner's present transmitter site.[2] However, the proposal is short-spaced to Canadian Station CFOX-FM, Channel 257C, Vancouver, British Columbia, and vacant Channel 258A at Sooke, British Columbia.

3. Canadian concurrence must be obtained for the proposal since Aberdeen is located within 320 kilometers (200 miles) of the U.S.-Canadian border. We shall seek a specially negotiated short-spaced allotment due to the above-mentioned short spacings, in accordance with the Working Arrangement under the Canada-U.S.A. FM Broadcast Agreement.

4. As requested, we shall propose the modification of the license of Station KAYO-FM to specify operation on Channel 257C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstate the availability of an additional equivalent channel at Aberdeen.

5. In view of the fact that Aberdeen could receive its second wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Aberdeen, Washington	257A, 284C1	257C1, 284C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 29, 1990,** and reply comments on or before **February 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Peter Gutmann, Esquire
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D. C. 20006
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner also filed a supplement to its petition.

[2] The coordinates are 46-56-59 and 123-49-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-62

In the Matter of

Amendment of Section 73.202(b), RM-6522
Table of Allotments,
FM Broadcast Stations.
(Quincy, Shingle Springs, and
Sutter Creek, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 22, 1989; Released: December 8, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2297, (1989) issued in response to a petition for Rule Making filed jointly by Olympic Broadcasters, Inc. ("OBI"), licensee of Station KQNC (FM), Channel 270C2, Quincy, California, and Lobster Communications Corporation (LCC), permittee of Station KLIQ(FM), Channel 271A, Shingle Springs, California. Petitioners request the substitution of Channel 270B1 for Channel 271A at Shingle Springs, and modification of the permit for Station KLIQ(FM) to specify operation on the higher powered channel. In order to accommodate the request in compliance with the Commission's minimum distance separation requirements, petitioners seek two additional changes to the FM Table of Allotments: (1) substitute Channel 271C2 for Channel 270C2 at Quincy, and modify the license of Station KQNC(FM) accordingly; and (2) substitute Channel 276A for Channel 269A at Sutter Creek, California, an allotment for which two applications are pending.[1]

2. Petitioners filed joint comments in response to the *Notice*. Jane A. Filler d/b/a Sutter Creek Radio and Susan E. Turgetto ("Turgetto")[2] both filed comments supporting the substitution of Channel 276A for Channel 269A at Sutter Creek, California. Various citizens of Placerville, Camino, and Sacramento, filed informal comments. [3]

3. During the pendency of this proceeding, Emerald Broadcasting Company, licensee of Station KTHO-FM, Channel 275C2, South Lake Tahoe, California, filed a proposal seeking the substitution of Channel 275C for Channel 275C2 at South Lake Tahoe,[4] and modification of its license accordingly.[5] In order to accommodate its proposal it seeks the substitution of Channel 298A rather than Channel 276A for Channel 269A at Sutter Creek. On our own motion, we will substitute Channel 298A rather than Channel 276A for Channel 269A at Sutter Creek. This would enable Emerald to obtain a channel upgrade, and would avoid any need to subsequently modify the Sutter Creek allotment to accommodate that upgrade. In addition, by allotting Channel 298A to Sutter Creek, no site restriction is required whereas an allotment of Channel 276A requires a site restriction of 1.4 miles north of Sutter Creek. Accordingly, the applicants for Channel 269A at Sutter Creek may amend their applications to specify the new channel. This may be accomplished without loss of "cut-off" status since the classes of channels are equivalent. *See, Salamanca, NY and Bradford, PA, 50 FR 26208 (1985)* and *Sanibel, FL, 50 FR 32706 (1985)*.

4. Petitioners state that the substitution at Shingle Springs will enable Station KLIQ(FM) to provide enhanced service to its community, as well as the surrounding Sacramento Valley area.

5. We believe the public interest would be served by substituting Channel 270B1 for Channel 271A at Shingle Springs at the site specified in the construction permit issued to Station KLIQ(FM).[6] Channel 271C2 can be substituted for Channel 270C2 at Quincy, California, at the existing site of Station KQNC(FM).[7] Further, Channel 298A can be substituted for Channel 269A at Sutter Creek in conformity with the minimum distance separation requirement of Section 73.207(b) of the Commission's Rules.[8]

6. Since the modification requests at Shingle Springs and Quincy conform with the provisions of Section 1.420 of the Commission's Rules, we shall modify the facilities of Station KLIQ(FM) and Station KQNC(FM), respectively, without entertaining other expressions of interest.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 22, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Quincy, California	262A, 271C2, 276A
Shingle Springs, California	270B1
Sutter Creek, California	298A

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Olympic Broadcasters, Inc., for Station KQNC(FM), Quincy, California, IS MODIFIED TO SPECIFY operation on Channel 271C2, in lieu of Channel 270C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Lobster Communications Corporation for Station KLIQ(FM), Shingle Springs, California, IS MODIFIED TO SPECIFY operation on Channel 270B1, in lieu of Channel 271A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following: Sutter Creek Radio, 3357 Kimberly Road, Cameron Park, CA 95682 and Susan E. Turgetto, 454 E. Cypress Street, Covina, CA 91723.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The applicants are Sutter Creek Radio (BPH-850712NF) and Susan E. Turgetto (BPH-850711MP). Although the former application was dismissed March 13, 1987, a petition for reconsideration of that action is pending.

[2] Turgetto stated in comments that she supports the proposed channel substitution, if such change does not involve reinstatement of the dismissed application of Sutter Creek Radio.

[3] Those comments were not filed in accordance with the requirements of Section 1.420(c) and (e) of the Commission's Rules. In addition, the latter comments were filed subsequent to the comment deadline, and were not served on the parties to this proceeding. Therefore, they will not be considered in this proceeding.

[4] Although the FM Table lists the Channel as 275B, its transmitter is located in Nevada in Zone I. Thus it is classified as a C2 station.

[5] Emerald Broadcasting Company ("Emerald") filed untimely comments and a counterproposal. In response, Olympic Broadcasters, Inc., and Lobster Communications Corporation jointly filed a motion to strike Emerald's comments. Although we are taking action to sever the Sutter Creek allotment from Emerald's request, Emerald's proposal at South Lake Tahoe is mutually exclusive with a proposal to allot Channel 273C2 to Virginia City, Nevada, and thus will be considered separately in the context of a different proceeding.

[6] Coordinates at the specified site for Station KLIQ(FM) are 38-37-53 and 120-51-26.

[7] Coordinates at the current transmitter site of Station KQNC(FM), are 40-03-35 and 120-54-42.

[8] Coordinates for Channel 298A at Sutter Creek, California, are 38-23-30 and 120-48-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-558

In the Matter of

Amendment of Section 73.202(b), RM-6924
Table of Allotments,
FM Broadcast Stations.
(Cameron, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 22, 1989; Released: December 8, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Cameron Radio, Inc. (petitioner), requesting the substitution of FM Channel 261C2 for Channel 222A at Cameron, Missouri.[1] Petitioner also requests modification of its construction permit for Station KDEE-FM, Channel 222A, to specify operation on Channel 261C2.

2. We believe petitioner's proposal warrants consideration. Channel 261C2 can be allotted to Cameron, Missouri, in compliance with the Commission's spacing requirements.[2] We shall propose to modify the construction permit of Station KDEE-FM, Channel 222A, as requested by the petitioner, to specify operation on Channel 261C2. However, should another party indicate an interest in the Class C2 allotment, the modification can not be implemented unless an equivalent class channel is also allotted. *See* Modification of FM and TV Station Licenses, 98 FCC 2d 916 (1984).

3. In order to provide a wide coverage area station for the Cameron, Missouri area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Cameron, Missouri	222A	261C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 29, 1990,** and reply comments on or before **February 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Cameron Radio, Inc.
Erwin G. Krasnow
Verner, Liipfert, Bernhard,
McPherson & Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Cameron Radio's petition was filed in reply comments as a counterproposal in MM Docket 89-36 (4 FCC Rcd 1765 (1989)), but was unacceptable as the counterproposal was untimely filed. *See* Section 1.420(d) of the Commission's Rules. However, due to the interest in expanding service in the Cameron area, we have accepted the counterproposal as a new petition for rule making.

[2] The coordinates for Channel 261C2 are 39-59-02 and 94-08-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-620

In the Matter of

Amendment of Section 73.202(b),	RM-6504
Table of Allotments,	RM-6729
FM Broadcast Stations.	
(Traverse City and Gladwin, Michigan)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 22, 1989; Released: December 8, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1248 (1989), issued in response to a petition filed by Fabiano-Strickler Communications, Inc. (petitioner), requesting the substitution of Channel 298C2 for Channel 298A at Traverse City, Michigan. Petitioner also requests modification of its license for Station WCCW-FM to specify operation on Channel 298C2 in lieu of Channel 298A. Petitioner filed comments restating its interest in the allotment at Traverse City. East-West Broadcasting, Inc. (East-West) filed a counterproposal.[2]

2. East-West's counterproposal requests the allotment of FM Channel 298A to Gladwin, Michigan, as that community's second FM broadcast service. East-West indicates that Gladwin is the county seat of Gladwin County, and as such is a center for business, industrial, and social activity. According to East-West, the public interest dictates that Gladwin be allotted its first competitive local FM service, rather than granting the upgrade at Traverse City, which would not provide an additional radio voice, new transmission service or diversity of views.

3. Petitioner opposes the counterproposal but contends that Channel 280A will soon be available for allotment at Gladwin, Michigan. Petitioner states that subject to the outcome of MM Docket 89-38, 4 FCC Rcd 1797 (1989), it is possible for the Commission both to upgrade Station WCCW-FM to a Class C2 facility and to allot a new Class A frequency to Gladwin. The proceeding in MM Docket 89-38 proposes the substitution of Channel 267A for Channel 280A at Sebewaing, Michigan, and modification of the construction permit held by Family Stations, Inc. to specify Channel 267A. Petitioner requests, however, that should the channel substitution at Sebewaing not take place or the Commission decide not to allot Channel 280A to Gladwin, preference be given to the upgrade at Traverse City over a second FM service at Gladwin. According to petitioner, the 1980 U.S. Census shows a population of 2,475 for Gladwin and the community has an AM and FM station which are separately programmed. Petitioner advises that Station WCCW-FM currently serves 65,587 people. As a Class C2 facility it would cover 111,378 people within its 60 dBu contour, operating from its present transmitter site, providing a new service to 47,791 people. According to petitioner, a Class A facility located at Gladwin operating at full Class A facilities would include only 29,544 persons within its 60 dBu contour. Petitioner argues that significantly more people would be served by a new Class A facility at Traverse City.

4. Based on the expression of interest, we find both communities are deserving of a new or improved FM service. The proposed Channel 298 cannot be allotted to both Traverse City and Gladwin in compliance with the Commission's spacing requirements. Ordinarily, a comparison of the two communities would be made using the priorities in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), to determine the outcome. However, we agree with petitioner that an additional channel is available to remove the conflict between Traverse City and Gladwin, allowing both communities additional service. We believe the public interest would be served by substituting FM Channel 298C2 for Channel 298A at Traverse City, Michigan, since it could provide the community with its third expanded coverage area broadcast service. Channel 298C2 can be allotted to Traverse City in compliance with the Commission's spacing requirements at petitioner's specified site. [3] In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the license of Station WCCW-FM to specify operation on Channel 298C2 in lieu of Channel 298A, as requested. Canadian concurrence has been obtained for this allotment.

5. In response to the counterproposal, we believe it would serve the public interest to allot a channel to Gladwin, Michigan. A staff analysis indicates that Channel 280A can be allotted to Gladwin without a site restriction.[4] Canadian concurrence has been obtained for the allotment of Channel 280A at Gladwin. Currently, Channel 280A at Gladwin is short spaced to Channel 280A, Mio, Michigan. However, in MM Docket 88-260, the construction permit for Station WFMA was modified to specify operation on Channel 230C2. *See*, 4 FCC Rcd 2640 (1989). This action was effective May 15, 1989. There is also a conflict with Channel 280A at Sebewaing, Michigan. However, in MM Docket 89-38, adopted October 17, 1989, the construction permit for Channel 280A was modified to specify Channel 267A, removing the conflict with Gladwin.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 22, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Gladwin, Michigan	276A, 280A
Traverse City, Michigan	270C1, 278C, 298C2

7. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WCCW-FM, IS MODIFIED TO SPECIFY operation on Channel 298C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the Secretary of Commission SHALL SEND by certified Mail, Return Receipt Requested, a copy of the Order to the following:

David C. Schaberg
6250 S. Cedar
Suite 12B001
Lansing, Michigan
48911-5715
(permittee for Channel
280A, Mio, Michigan)

Family Stations, Inc.
3108 Fulton Avenue
Sacramento, California 95821
(permittee for Channel 280A,
Sebewaing, Michigan)

9. The window period for filing applications for Channel 280A Gladwin will open on **January 23, 1990,** and close on **February 22, 1990.**

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The Community of Gladwin has been added to the caption.

[2] Public Notice was given on April 20, 1989, Report No. 1776 (RM-6729).

[3] The coordinates for Channel 298C2 at Traverse City are 44-46-11 and 85-41-22.

[4] The coordinates for Channel 280A at Gladwin are 43-59-00 and 84-29-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-557

In the Matter of

Amendment of Section 73.202(b), RM-7043
Table of Allotments,
FM Broadcast Stations.
(Lumberton, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 22, 1989; Released: December 8, 1989

By the Chief, Allocations Branch:

1. Stone-Lamar Broadcast Services Corporation (petitioner), has filed a petition for rule making seeking the substitution of FM Channel 237C2 for Channel 237A at Lumberton, Mississippi. Petitioner also requests modification of its license for Station WLUN, Channel 237A, to specify operation on Channel 237C2.

2. A staff engineering analysis has determined that Channel 237C2 can be alloted to Lumberton consistent with the minimum distance spacing requirements specified in Section 73.207 of the Commission's Rules.[1] We shall also propose to modify the license of Station WLUN, Channel 237A, to specify operation on Channel 237C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the fact that the proposal could provide a wide coverage area service to Lumberton, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Lumberton, Mississippi	237A	237C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 29, 1990,** and reply comments on or before **February 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Samuel Miller
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment, which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 237C2 are 30-51-30 and 89-11-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-556

In the Matter of

Amendment of Section 73.202(b), RM-6794
Table of Allotments,
FM Broadcast Stations.
(Copeland, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 22, 1989; Released: December 8, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Sound Broadcasting, Inc. (petitioner), seeking the allotment of FM Channel 251C1 to Copeland, Kansas, as that community's second FM broadcast service.

2. In support of its proposal, petitioner states it is one of two applicants for Channel 256C1 at Copeland, Kansas, and the allotment of Channel 251C1 would accommodate both applicants' desires for a channel and avoid a comparative hearing for Channel 256C1.[1] Petitioner requests that it be given cut off protection and its application (File No. 880825OC) for Channel 256C1 be amended to specify Channel 251C1. According to petitioner, another Class C1 channel is available for allotment at Copeland should other parties express interest in applying for a third channel in the community.[2]

3. We believe petitioner's proposal warrants consideration. Channel 251C1 can be allotted to Copeland, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 23.8 kilometers (14.8 miles) southeast of the community. [3] The site restriction will prevent a conflict with a construction permit for Station KCLH, Channel 250C, Colby, Kansas, and with a new petition to substitute Channel 252C3 for Channel 252A at Spearman, Texas.[4] Since it appears that there is an additional equivalent class channel available for other expressions of interest, we propose to allow Sound Broadcasting to amend its application to specify Channel 251C1, retaining its cut off protection. At the same time, we shall entertain expressions of interest for Channel 278C1 at Copeland.

4. In view of the fact that the proposed allotment could provide a second FM broadcast service to Copeland, Kansas, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following Community:

City	Channel No. Present	Proposed
Copeland, Kansas	256C1	251C1, 256C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 29, 1990,** and reply comments on or before **February 13, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald E. Martin
Spencer W. Weisbroth
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036
(Counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Channel 256C1 was allotted to Copeland, Kansas, in MM Docket 87-362, 3 FCC Rcd 3627 (1988). The window for filing applications opened on July 26, 1988, and closed on August 25, 1988.

[2] A staff analysis confirms that Channel 278C1 can be allotted to Copeland, Kansas, at city reference coordinates of 37-32-30 and 100-37-42.

[3] The coordinates for Channel 251C1 are 37-22-50 and 100-27-05.

[4] Petitioner is the permittee for Channel 250C, Colby, Kansas (BPH-871120MB).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-258

In the Matter of

Amendment of Section 73.202(b), RM-5013
Table of Allotments,
FM Broadcast Stations.
(Lebanon, Virginia)

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 1989; Released: December 8, 1989

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it two Petitions for Reconsideration, both filed by Murray Communications ("Murray"). The first petition requests reconsideration of a staff action returning as unacceptable Murray's petition for rule making to allot Channel 225C2 to Colonial Heights, Virginia. Murray's second petition for reconsideration requests reconsideration of this proceeding's *Report and Order*, 51 Fed. Reg. 27411 (1986), which allotted Channel 297A to Lebanon, Virginia. Murray also filed a petition for stay of the *Report and Order's* effect.[1] Murray's petitions for reconsideration are a result of its efforts to obtain the allotment of Channel 225 to Colonial Heights, Virginia.

FIRST PETITION FOR RECONSIDERATION

Background

2. Murray first petitioned for rule making to allot Channel 225C2 to Colonial Heights on April 4, 1985.[2] Murray's petition for rule making was returned as unacceptable due to short spacings to Class C Station WVLK, Lexington, Kentucky, Class C Station WLSD, Big Stone Gap, Virginia, and to a counterproposal in MM Docket 84-231 for Clinchco and Coeburn, Virginia. Murray petitioned for reconsideration on May 7, 1985.

3. Murray's petition advanced four grounds for reconsideration. First, Murray argued that the short spacing to Station WVLK-FM was illusory because, although Station WVLK-FM was entitled to 16 kilometers additional "buffer zone" protection pursuant to the Commission's action in MM Docket 80-90, and Murray's proposal was short spaced to WVLK's buffer zone, Murray's proposal was not short spaced to WVLK's existing facility, and WVLK would not be able to move toward Colonial Heights due to spacing constraints caused by Station WMIK-FM, Channel 224A at Middlesboro, KY. Second, Murray argued that the short spacing to Station WLSD was illusory because another station, WBBO at Forrest City, North Carolina, had since obtained a construction permit for greater than minimum Class C facilities, thereby eliminating WLSD'S buffer zone, and thereby creating additional areas for siting Channel 225C2 at Colonial Heights. In an engineering statement submitted with its petition for reconsideration, Murray proposed an alternative site for the allotment of Channel 225C2 to Colonial Heights, at coordinates 36-22-30 and 82-22-30. Murray stated that this newly proposed site was its preferred site, and submitted information showing that the new site would be fully spaced, except with respect to WVLK's buffer zone. Third, Murray contended that its proposal should have been treated as a responsive statement in Docket 84-231, even though it was untimely as a counterproposal. Finally, Murray contended that the Clinchco/Coeburn proposal in MM Docket No. 84-231 was improperly under consideration because the Clinchco and Coeburn proposals did not conflict with any proposal advanced in the *Further Notice of Proposed Rule Making* in Docket 84-231. [3]

4. Murray asked for acceptance of its petition, or that the petition be held in abeyance pending action on the conflicting proposal in Docket 84-231. Murray also requested acceptance of its proposal nunc pro tunc. Crawford Broadcasting, Inc. ("Crawford"), licensee of Station WCCT-FM, Corbin, Kentucky, filed an opposition. Crawford states that its proposal to allot Channel 297C2 to Corbin, Kentucky, and the necessary associated channel changes at Clinchco and Coeburn, were clearly mutually exclusive with the Commission's proposal in Docket 84-231 to allot Channel 297A to Coeburn. Crawford also argues that Murray's Colonial Heights proposal was clearly foreclosed from consideration in MM Docket 84-231 because it amounted to a late-filed counterproposal.

5. In reply, Murray contends that although its proposal need not be accepted as a counterproposal, it should be accepted and considered as a responsive statement in Docket 84-231. Second, although not challenging Crawford's statement that its proposal to allot Channel 297C2 to Corbin clearly conflicted with the proposal to allot Channel 297A to Coeburn advanced in the *Further Notice of Proposed Rule Making*, and not challenging Crawford's statement that channel changes at Coeburn and Clinchco might be necessary to accommodate Crawford's proposal, Murray states that the proposed changes at Coeburn and Clinchco were not mutually exclusive with the proposals for Coeburn advanced in the *Further Notice of Proposed Rule Making*.

Discussion

6. Murray's first Petition for Reconsideration will be denied, and its petition for rule-making will not be afforded *nunc pro tunc* treatment. Murray's contention that its proposal was acceptable, despite a short-spacing to the buffer zone of Station WVLK-FM, is without merit. The purpose of the "buffer zone" was to provide to existing Class C stations facing potential reclassification to a lower class channel as a result of our actions in Docket 80-90 flexibility in choosing sites that would allow specification of minimum Class C facilities. The buffer zone was in effect until March 2, 1987, and precluded the filing of rule making petitions conflicting with the buffer zone.

7. Except for cases in which the licensee of a station expressly waived its buffer zone, the Commission did not provide any exception to buffer zone protection for rule making petitions short-spaced to a buffer zone, even where the station protected by the buffer zone could not

utilize a portion of the buffer zone due to spacing constraints from existing stations. Such an exception would have foreclosed a Class C station from seeking to remove spacing constraints caused by existing stations that limited the use of sites in its buffer zone, sites which would allow it to maintain its Class C status. An existing Class C licensee could remove such constraints by petitioning to change the channel of an existing station that constrained the area within its buffer zone usable for specifying full Class C facilities, or by reaching an agreement with the other station for a transmitter site move that would free the affected portion of the buffer zone. Therefore, despite the fact that sites in a significant portion of WVLK-FM's buffer zone were short spaced to Station WMIK-FM at Middlesboro, Kentucky, there was no guarantee when Murray's petition was filed that WMIK-FM would remain on its existing channel or at its existing site in Middleboro until March 2, 1987, when WVLK-FM's buffer zone expired. Moreover, WVLK did not waive its buffer zone. Accordingly, we reject Murray's contention that we should have considered a "mitigated" buffer zone for Station WVLK-FM.

8. We note that both the site originally specified in Murray's petition for reconsideration and the alternative site advanced in Murray's petition for reconsideration were short-spaced to WVLK's buffer zone. Accordingly, the fact that Murray's second proposed site did not violate the Commission's spacing requirements to Station WLSD's buffer zone, although removing one basis for the return of Murray's proposal, does not affect the correctness of our decision. We note that the Commission ultimately adopted, on April 23, 1986, an option in the Corbin/Coeburn and Clinchco proceeding that did not conflict with Murray's proposal at Colonial Heights. *See Fourth Report and Order* in MM Docket 84-231, 51 FR 23761 (1986). Therefore, even if the Commission erred by not considering Murray's proposal as a comment in Docket 84-231, the error was harmless.

SECOND PETITION FOR RECONSIDERATION

Background

9. While Murray's first Petition for Reconsideration was pending, the Mass Media Bureau adopted a *Notice of Proposed Rule Making* in this proceeding. *See* 50 Fed. Reg. 35845(1985) ("Notice"). The *Notice* proposed the allotment of Channel 263A to Lebanon, Virginia, as that community's first FM service. Murray filed a counterproposal, proposing the allotment of Channel 297A instead of 263A to Lebanon, in order to allow the substitution of Channel 263A for Station WABN's Channel 224A at Abingdon, Virginia, thereby allowing the allotment of Channel 225C2 to Colonial Heights, Virginia. Murray also indicated that Channel 225A could be allotted to Colonial Heights, and that it would apply for a Class A allotment. Murray's counterproposal was timely filed on October 21, 1985, in response to the *Notice*. However, when filed it shared the same defect as Murray's earlier proposal, in that it constituted an untimely counterproposal to the Clinchco and Coeburn, Virginia, proposals in MM Docket 84-231. The counterproposal requested the allotment of Channel 225C2 at the same site specified in Murray's earlier petition, and requested the allotment of Channel 225A at coordinates 36-28-00 and 82-28-00. In supplemental reply comments Murray suggested the allotment of Channel 225C2 at coordinates 36-13-45 and 82-28-00, and Channel 225A at coordinates 36-23-15 and 82-32-00.

10. Instead of considering Murray's proposal in the context of this proceeding, the Bureau consolidated Murray's proposal for Channel 225A with two mutually exclusive petitions for rule making in MM Docket 86-218. *See Notice of Proposed Rule Making*, 51 Fed. Reg. 21777 (June 16, 1986). In note 1 of the *Notice* in Docket 86-218, the Bureau set out the history of Murray's first petition and petition for reconsideration, and noted that Murray's proposal to allot Channel 225A to Colonial Heights, first advanced in this proceeding, could for the first time be considered because the Commission's action in Docket 84-231, alloting Channel 226A to Clinchco, Virginia, and Channel 259A to Coeburn, Virginia, had removed a potential conflict between Channel 226A at Coeburn and Channel 225A at Colonial Heights. The Commission took that action in Docket 84-231 on April 23, 1986, after the deadline for filing counterproposals in this proceeding. Murray filed a Petition for Reconsideration and Motion for Stay of the *Notice* in Docket 86-218 on July 3, 1986.[4] On July 24, 1986, the Bureau issued its *Report and Order* in this proceeding. The *Report and Order* allotted Channel 297A to Lebanon, as requested by Murray. At note 2 the Bureau addressed the treatment of Murray's proposal to allot Channel 225A to Colonial Heights, again setting out the history of Murray's proposal to allot Channel 225C2 to Colonial Heights, and stating that, in order to preserve Murray's opportunity to pursue Channel 225C2 at Colonial Heights in Docket 86-218, Channel 297A had been allotted to Lebanon rather than Channel 263A.[5]

11. Murray petitioned for reconsideration of the *Report and Order* in this proceeding on July 3, 1986. Murray's petition for reconsideration argues that the Bureau should have considered both its proposal for Channel 225C2 and its proposal for Channel 225A at Colonial Heights in this proceeding, rather than treating the proposal for Channel 225A at Colonial Heights in a separate proceeding where conflicting proposals might be advanced. Murray argues that denial of cut-off protection to its proposals in this proceeding is both unfair and unnecessary. By a separate *Report and Order* adopted simultaneously with this *Memorandum Opinion and Order*, we are alloting in another proceeding, MM Docket 86-237, Channel 290A to Colonial Heights, Virginia, at Murray's request. Therefore, Murray's petition, insofar as it objects to our refusal to allot a Class A channel to Colonial Heights in this proceeding, is moot. Accordingly, we will address only those portions of Murray's second petition for reconsideration objecting to our refusal to allot Channel 225C2 to Colonial Heights in this proceeding.

12. With respect to Channel 225C2 at Colonial Heights, Murray contends that the Commission's April 23, 1986, action with respect to Clinchco and Coeburn, Virginia, in MM Docket 84-231, allowed for the grant of Murray's Channel 225C2 proposal in this proceeding. Somewhat inconsistently, Murray also contends that no possible outcome of the Clinchco/Coeburn proceeding would have conflicted with Murray's proposal for Channel 225C2. Second, Murray advances an alternative proposal. Specifically, Murray now requests that Channel 297A, allotted in the *Report and Order* to Lebanon in order to accom-

modate Murray, should instead be used as a substitute for Channel 224A at Abingdon, Virginia, an allotment that conflicts with Channel 225C2 at Colonial Heights.

Discussion

13. Murray's second petition for reconsideration will be denied. Although the Commission's April 23, 1986, action in MM Docket 84-231 removed a conflict between Murray's Channel 225C2 proposal and a proposal to allot Channel 226A to Coeburn, Virginia, that action occurred after the cut-off date in this proceeding, October 21, 1985. When filed, Murray's counterproposal conflicted with the proposal to allot Channel 226A to Coeburn, and was, therefore, unacceptable because it conflicted with an earlier filed and cut-off proposal in a different proceeding. Nowhere in its petition for reconsideration does Murray provide any support for its claim that Channel 225C2 in no way conflicted with the proposal in MM Docket 84-231 to allot Channel 226A to Coeburn, Virginia. In fact, the Coeburn Channel 226A proposal, at coordinates 36-58-00 and 82-30-00, is 81.9 kilometers from Murray's Channel 225C2 proposal,[6] whereas the Commission's rules requires 105 kilometers between Class A and C2 first adjacent channels.[7]

14. Although Murray's Channel 225C2 proposal became acceptable on April 23, 1986, due to the Commission's action allotting a different channel to Coeburn, it was not, prior to that date, acceptable and, therefore, not entitled to consolidation with an earlier filed and cut-off proposal, such as the proposal for Lebanon.

15. In view of the above, IT IS ORDERED, That the Petition for Reconsideration filed by Murray Communications on May 7, 1985 IS DENIED.

16. IT IS FURTHER ORDERED, that the Petition for Reconsideration of the *Report and Order* in this proceeding, filed by Murray Communications, IS DENIED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Acting Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The petition for stay will be denied for failure to show a likelihood of success on the merits or irreparable injury if the stay is not granted.

[2] The coordinates for Murray's proposal were 36-15-00 and 82-25-00.

[3] Murray's fourth contention amounts to a petition for reconsideration of our decision to consider the Corbin/Clinchco and Coeburn proposal in MM Docket 84-231. At the time Murray's petition was filed, the Commission had made no final determination as to that proposal. Murray's petition was, therefore, premature, and amounted to a petition for reconsideration of an interlocutory action. The Commission's rules do not allow for the filing of such petitions. Accordingly, Murray's fourth contention will not be further addressed.

[4] Murray's Petition for Reconsideration and Motion for Stay will be treated in the *Report and Order* in MM Docket 86-218. However, we note that the Commission's rules only provide for the filing of petitions for reconsideration of final rule making actions, not interlocutory actions such as the issuance of a notice of proposed rule making.

[5] On September 29, 1989, Murray submitted a supplement to its petition for reconsideration and a request for expedited consideration. Murray did not seek leave to file that supplement. In accordance with Section 1.429 of our rules, and in view of the fact that Murray's request is mooted by our action in this and related proceedings, we will not further consider Murray's supplement and request.

[6] In making this determination, we utilize coordinates 36-13-45 and 82-28-00, the set of coordinates from the numerous sets suggested by Murray that are most distant from the Coeburn coordinates.

[7] In an engineering statement first submitted in connection with Murray's unauthorized supplemental reply comments in this proceeding, Murray contends that the Coeburn proposal was invalid because it was short spaced to the buffer zone of Station WSEZ, Channel 226C, at Winston-Salem, North Carolina. A staff engineering analysis confirms that Channel 226A at Coeburn was 1.2 kilometers short-spaced to WSEZ's buffer zone. The Coeburn proposal, at coordinates 36-58-00 and 82-30-00 was, at the time Murray's counterproposal was filed, 236.8 kilometers from WSEZ, then at coordinates 36-08-58 and 80-03-21, whereas a separation of 238 kilometers was required. However, the slight site restriction on the Coeburn allotment necessary to obviate this 1.2 kilometer short spacing would not have eliminated the short spacing between Murray's Channel 225C2 proposal and the Coeburn Channel 226A proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-545

In re Applications of

STEELE COMMUNICATIONS COMPANY, INC. (hereafter "Steele")	File No. BPH-870724MC
NORTHEAST KINGDOM BROADCASTING, INC. (hereafter "Northeast")	File No. BPH-870727MC
HAYLEY M. CAMPBELL (hereafter "Campbell")	File No. BPH-870727MH
MEMPHREMAGOG MEDIA, INC. (hereafter "Memphremagog")	File No. BPH-870727MN
DERBY HOMETOWN BROADCASTERS, LIMITED PARTNERSHIP (hereafter "DHBLP")	File No. BPH-870727MP

For Construction Permit
for a New FM Station on
Channel 221A in Derby Center, Vermont.

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: December 11, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters.* Steele petitioned for leave to amend its application on December 9, 1987. The amendment accompanying the petition proposed a new transmitter site and supplemented the subject application by notifying the Commission of Steele's intention to install auxiliary power. Steele's amendment was filed after the last date for filing minor amendments as of right. In support of its request to change its transmitter location, Steele cites 47 C.F.R. § 73.3522(a) and 47 C.F.R. § 1.65 and asserts that a decision was made to locate its transmitter on land it purchased adjacent to the originally proposed transmitter site. Steele further asserts that acceptance of the amendment will neither give it a comparative advantage nor comparatively disadvantage the other mutually exclusive applicants for the subject allocation. Steele has failed to make the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a), for acceptance of its late filed amendment. *See Leonard James Giacone, Hearing Designation Order* in MM Docket 88-116, 3 FCC Rcd 2025, 2026 (1988). Accordingly, Steele's petition for leave to amend will be denied and the amendment will be returned.

3. DHBLP petitioned for leave to amend its application on July 26, 1988. The accompanying amendment was filed after October 3, 1987, the last date for minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. DHBLP has disclosed that its general partner, McDonnell W. Smith, is employed by White Mountain FM, Inc., licensee of Station WMTK(FM), Littleton, New Hampshire. DHBLP has indicated that Mr. Smith will terminate this employment and sever all connections with Station WMTK(FM) upon grant of the subject application. Accordingly, an appropriate divestiture condition will be specified below.

5. In response to Section VI, FCC Form 301, the applicant below has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the 5-point model EEO Program. The EEO program submitted by the following applicant is incomplete or is otherwise deficient in the manner described. Accordingly, the listed applicant will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of the release of this Order.

APPLICANT	DEFICIENCY
Steele	Failed to identify specific sources of recruitment specializing in women candidates.
	Failed to identify specific publications which will be utilized to attract women candidates.

6. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Steele, Campbell and DHBLP have not completed Item 4 correctly. Steele's application gives a post office box number for its address and for the residence address of its principals Thomas S. Steele and Carol J. Iacuone. Campbell also gives a post office box as her residence address. DHBLP fails to list a number for the street address of its general partner, McDonnell W. Smith. Accordingly, Steele, Campbell and DHBLP will each be required to submit amendments which provide all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. An engineering study of Northeast's application reveals that in Section V-B, Item 7(a) an effective radiated power (ERP) of 0.89 is specified for both the horizontal and vertical radiation component. However, a review of the directional antenna pattern submitted with the application reveals that the ERP for the vertical radiation component is 0.82 kilowatts. This figure is also confirmed in Exhibit B-6, page 3 of the engineering discussion. This discrepancy is neither a tenderability nor an acceptability defect because neither value used for the vertical ERP would violate any Commission rule. However, the deficiency must be corrected with an amendment. Accordingly, Northwest must amend its application, within 30 days of the release of this Order, to specify an ERP for the vertical radiation component of 0.82 kilowatts in Section V-B, Item 7(c).

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to 47 § 309(e) the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Steele on December 9, 1987 IS DENIED and the accompanying amendment IS RETURNED.

12. IT IS FURTHER ORDERED, That the petition for leave to amend filed by DHBLP IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That in the event of grant of DHBLP's application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commission that its principal McDonnell W. Smith has terminated his employment and severed all connections with Station WMTK(FM), Littleton, New Hampshire.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Steele shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge.

15. IT IS FURTHER ORDERED, That Steele, Campbell and DHBLP shall each submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That Northeast shall submit an amendment specifying an effective radiated power of 0.82 kW for its vertical radiation component with the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] An application filed by Derby Broadcasting, Inc. (BPH-870724MD), was returned by the Chief, FM Branch, Audio Services Division, by letter dated July 5, 1988, as unacceptable for filing. No petition for reconsideration of this action has been filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-537

In re Applications of

Burnett Broadcasting, Ltd. (hereafter "Burnett")	File No. BPH-871202MD
Northeast Pennsylvania Fine Music Broadcast Company, Inc. (hereafter "Fine Music")	File No. BPH-871202ME
Mountaintop Radio, Inc. (hereafter "Mountaintop")	File No. BPH-871203MG
Felicia Ann Oliver (hereafter "Oliver")	File No. BPH-871203MK
Crystal Lake FM Limited Partnership (hereafter "Crystal Lake")	File No. BPH-871203NC
Fairview Communications, Inc. (hereafter "Fairview")	File No. BPH-871203NK
Mountaintop FM Limited (hereafter "Mountain FM")	File No. BPH-871203NP

For Construction Permit
for a New FM Station on Channel 246A
in Mountaintop, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: November 13, 1989; Released: December 11, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station on Channel 246A in Mountaintop, Pennsylvania.

2. *Burnett and Fine Music.* Burnett and Fine Music each propose to locate their antennas on the existing former main tower of WVIA-TV, Wilkes-Barre, PA. Both applicants correctly show the height of this tower as being 243 feet/74 meters above ground level and 2363 feet/720 meters above mean sea level. However, the coordinates for this tower as proposed by each applicant differ with those on file at the Commission for this tower:

Burnett: 41^0 1057" NL 75^0 52' *17* " WL
Fine Music: 41^0 10' 57" NL 75^0 52' *10* " WL

The most recent Commission authorization (BSCT-112, dated December 7, 1970) shows the coordinates as: 41^0 10' 57" NL 75^0 52' *20* " WL. We note, however, that the Commission records for the WVIA-TV tower show several conflicting sets of coordinates over the years, without explanation for the changes.

Because these applicants clearly propose to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the applications in question, the staff could, "drawing on the application|s| as a whole, " confidently verify the transmitter location by taking official notice of the site coordinates and tower heights as found in the Commission's files for the licensed co-located facility. Accordingly, Burnett and Fine Music were found to be acceptable for filing; however, they shall be required to file clarifying amendments to their applications with the Presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Oliver.* In her application, Oliver indicates that the proposed antenna will be located on an existing tower supporting antennas for Domestic Public Land Mobile stations KGC 397 and KKB 412. Oliver lists the coordinates for this tower as 41^0 10' *58* " NL, 75^0 52' 12" WL. However, Commission records actually list this tower as being located at 41^0 10' 57 " NL, 75^0 52' 12" WL. In addition, Commission records show the tower structure height as being 35 feet above ground level, and not 37 feet as indicated by Oliver. Because Oliver clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is make to this tower in various places in the application in question, the staff could, "drawing on the application as a whole", confidently verify the transmitter location and tower height by taking official notice of the site coordinates and tower height as found in the Commission's files for the licensed colocated facilities. Accordingly, Oliver's application was found to be acceptable for filing; however, Oliver shall be required to file a corrective amendment to her application with the presiding Administrative Law Judge within 30 days of the release of this Order.

4. *Fairview.* Robert Crawford, a principal of the applicant, has indicated his intent to terminate his employment with WEAY(FM), (old call sign WMJW(FM))

Nanticoke, Pennsylvania and with Citizens Voice Newspaper, a daily newspaper located in Wilkes-Barre, Pa., in the event of grant of the Fairview application. Accordingly, an appropriate divestiture condition will be specified.

5. *Crystal Lake.* Information before the Commission indicates that Crystal Lake was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise is a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. These unresolved character issues call into question Crystal Lake's qualifications to be a Commission licensee. Therefore, such issues will be specified against Crystal Lake in this proceeding.

6. Crystal Lake has petitioned for leave to amend its application on May 9, 1989, June 15, 1989, August 2, 1989 and September 27, 1989. Oliver has petitioned for leave to amend her application on September 21, 1989. The accompanying amendments were filed after February 28, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed real party-in-interest to the application of Crystal Lake FM Limited Partnership.

2. To determine whether Crystal Lake's organizational structure is a sham.

3. To determine, based on the evidence adduced pursuant to issues 1 and 2 above, whether Crystal Lake possesses the basic qualifications to be a Commission licensee.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Burnett and Fine Music file clarifying amendments to their respective applications regarding the coordinates for their proposed tower structure with the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That Oliver file a corrective amendment to her application with the presiding Administrative Law Judge within 30 days of the release of this Order regarding the coordinates of her proposed tower.

12. IT IS FURTHER ORDERED, That if a construction permit is awarded to Fairview as a result of this proceeding, Robert Crawford will sever his relationship with WEAY and Citizens Voice Newspaper prior to commencement of program test authority.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Crystal Lake and Oliver are granted and the corresponding amendments are accepted to the extent indicated herein.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 8, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENT ON US WEST'S PLAN FOR COMPARABLY EFFICIENT INTERCONNECTION TO ENHANCE SERVICE PROVIDERS FOR VOICESTORE AND FORWARD SERVICE

On October 24, 1989, US West, Inc. (US West) filed a plan to offer comparably efficient interconnection (CEI) to competing enhanced service providers (ESPs) for a voice store and forward service. In its filing, US West states that it plans to offer voice store and forward service without structural separation. US West explains that the voice store and forward service will provide an easy means for end users to obtain information from audiotex ESPs, allows ESPs to store information, and permits end users to interact with ESPs. US West will use its Voice Storage System (VSS) to store the ESP information, and end users will be able to access the VSS to obtain the stored information. US West is currently conducting a market trial of its voice store and forward service, pursuant to the Commission's CEI Waiver Order (4 FCC Rcd 1266 (1989)).

As required in the *Computer III* proceeding (*Phase I Order*, 104 FCC 2d958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve this CEI plan before US West can begin implementing the proposed service.

US West describes how it will satisfy the Commission's CEI parameters, and states that it will account for the joint and common costs of the services pursuant to its Part 32 cost allocation manual. US West also describes its plans for complying with the other *Computer III* nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting, and disclosure of network information.

Interested parties should file comments on this plan by **January 9, 1990** and reply comments by **January 24, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of US West's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY — Transmittal Nos. 1310 and 1320

Revisions to Tariff F.C.C. No. 61
To Introduce Rates for X.25 and X.75
Protocol Packet Switching Network
Channel Interfaces

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 1989; Released: December 8, 1989

By the Commission:

I. INTRODUCTION

1. On May 10 and June 28, 1985, Southern Bell Telephone and Telegraph Company (Southern Bell) filed tariff revisions under Transmittal Nos. 1310 and 1320, respectively, to introduce rates for X.25 and X.75 dedicated ports accessing its Public Packet Switching Network (PPSN) in various local access and transport areas (LATAs) and in the states of Florida, Georgia, North Carolina, and South Carolina. GTE Telenet Communications Corporation (Telenet) filed a petition to reject the proposed tariff revisions on July 15, 1985. Subsequently, the Common Carrier Bureau initiated an investigation and ordered Southern Bell to submit semi-annual revenue and cost reports for its X.25 and X.75 interface arrangements. The Bureau stated it would designate specific issues for investigation following a review of these reports.[1]

2. By this Order, we terminate the investigation of Southern Bell's X.25 and X.75 interface arrangements. This Commission finds that the circumstances which originally prompted the Bureau to initiate this investigation are no longer present, and that, therefore, it is unnecessary to designate specific issues for further examination.

II. BACKGROUND

3. In the *Second Computer Inquiry*, this Commission required the Bell Operating Companies (BOCs) to provide enhanced services that the BOCs choose to offer through separate subsidiaries.[2] We subsequently granted the BOCs a waiver of this requirement to allow the provision of asynchronous-X.25 protocol conversion without structural separation. [3] The *Protocol Waiver Order* concluded, however, that this new service configuration might enable the BOCs to engage in potentially unfair competition against other enhanced service providers. Consequently, we limited the waiver by requiring the BOCs to: (1) provide an accounting plan to segregate nonregulated activity costs; (2) take inter-office channels on the same terms and conditions as their competitors when offering enhanced services; (3) include in their packet service rate structures a network utilization rate element to charge customers discretely for network inefficiencies imposed by the provision of protocol conversion; and (4) provide end users with equal access to the protocol conversion offerings of the BOCs and other service providers.[4]

4. In response to the *Protocol Waiver Order*, Southern Bell filed tariff revisions under Transmittals 1310 and 1320, proposing access rate elements for interstate access to its local PPSN utilizing X.25 and X.75 protocol interfaces. Telenet petitioned against the revisions, claiming that Southern Bell's economic support material was insufficient, its cost methodology flawed, its demand projections unexplained and unrealistically high, and its proposed rates too low. In its *Investigation Order* released October 9, 1985, the Common Carrier Bureau denied Telenet's petition to reject. However, the Bureau determined that the Telenet petition identified several problems with the tariff that warranted further examination. Consequently, the Bureau initiated an investigation to determine whether Southern Bell's proposed rates for X.25 and X.75 interface arrangements were cost-based. To facilitate the investigation, the Bureau ordered Southern Bell to submit semi-annual reports beginning January 2, 1986, detailing revenues and costs for the provision of its X.25 and X.75 interface arrangements and the methodology employed to calculate investment and expenses.[5]

5. Shortly after the Bureau initiated its investigation, BellSouth Corporation (BellSouth), on behalf of Southern Bell, submitted a large-scale accounting compliance plan. In an Order released April 1, 1986, the Bureau approved the plan, concluding that BellSouth had complied with the conditions set forth in the *Protocol Waiver Order* for the provision of packet switching services.[6] Tymnet, Inc.,(Tymnet) and Telenet filed applications for review of the *BellSouth Compliance Order*, claiming, *inter alia* , that the Bureau erred in waiving Section 61.74 of this Commission's Rules, 47 C.F.R. § 61.74, thereby allowing BellSouth to reference its intrastate tariffs for packet switching services in its interstate tariff. Tymnet and Telenet argued that the practice of cross-referencing would prevent the Commission from determining whether BellSouth's rates were cost-based. The Commission reversed the Bureau's decision to grant the cross-reference waiver, but declined to require cost support materials for BellSouth's rates.[7] The Commission waived Section 61.38 of the Rules, 47 C.F.R. § 61.38, freeing BellSouth from the requirement that it submit detailed cost and demand projections for its public packet switching service. The Commission concluded it was unnecessary for BellSouth to submit this information. The Order noted that BellSouth, as a new entrant in the recently established packet switching market, was unlikely to engage in anticompetitive or improper pricing.[8]

III. DISCUSSION

6. We conclude that the Commission's determinations in the *BellSouth Review Order* should be applied in assessing the sufficiency of Southern Bell's cost support information here. In that Order, the Commission granted BellSouth, on behalf of Southern Bell, a waiver of the requirements of Section 61.38, stating that:

> under the circumstances of this case, further cost support data are not necessary. . . . Section 61.38 of our Rules normally requires that carriers proposing to offer a new service submit a study projecting costs for a representative 12-month period as well as estimates of the effect of the proposed tariff revisions on the carrier's traffic and revenues. As we have indicated, . . . such data are used to facilitate the staff's review of tariff filings and to permit the staff to determine whether an investigation is necessary. As such, the decision whether to require the submission of such data is a matter clearly committed to the sound discretion of this Commission. Because we find that existing market conditions make it unlikely that BellSouth could engage in anti-competitive or otherwise improper pricing, we conclude that it is reasonable to waive the requirement that BellSouth submit detailed cost and demand projections for [PPSN] at this time.[9]

7. The record in this proceeding is consistent with the reasoning that led the Commission to approve the waiver of Section 61.38 cost support information in the *BellSouth Review Order*. Southern Bell's pleadings indicate that no cross-subsidies have flowed from its basic exchange services to its packet switching and protocol conversion services.[10] Southern Bell's semi-annual reports also demonstrate that its PPSN service has, in fact, had very limited impact on the market.[11] While we recognize that market conditions are seldom static, we believe the complaint procedures under Section 208 of the Communications Act, 47 U.S.C. § 208, provide a viable check, under present circumstances, against future anticompetitive or otherwise improper behavior. We may, of course, initiate investigations of local exchange carrier packet switching services in the future should conditions change. In light of these conclusions, we find that our administrative resources are best employed, consistent with the Communications Act, by terminating our investigation of Transmittal Nos. 1310 and 1320.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that the investigation of Southern Bell Telephone and Telegraph Company, Tariff F.C.C. No. 61, Transmittal Nos. 1310 and 1320, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Southern Bell Telephone and Telegraph Company, Revisions to Tariff F.C.C. No. 61 To Introduce Rates for X.25 and X.75 Protocol Packet Switching Network Channel Interfaces, Mimeo No. 107, released Oct. 9, 1985 (Com.Car.Bur.) (*Investigation Order*).

[2] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (*Final Decision*), *recon.*, 84 FCC 2d 50 (1980), *futher recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.*, Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 938 (1983) (*Second Computer Inquiry*). The separate subsidiary requirement that this Commission imposed upon the pre-divestiture American Telephone and Telegraph Company was subsequently applied to the post-divestiture BOCs. *See* Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117 (1984), *aff'd sub nom.*, Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984).

[3] *See* Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[4] *Id.* at 1093-1112.

[5] *Investigation Order*, at para 18.

[6] *See* BellSouth Corporation on Behalf of Southern Bell Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations To Authorize Protocol Conversion Offerings, Mimeo No. 3480, released Apr. 1, 1986 (Com.Car.Bur.) (*BellSouth Compliance Order*).

[7] BellSouth Corporation on Behalf of Southern Bell Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations To Authorize Protocol Conversion Offerings, FCC 88-333, 3 FCC Rcd 6961 (1988) (*BellSouth Review Order*).

[8] *Id.* at 6962.

[9] *Id.*

[10] Southern Bell states that "the cost methodology for this tariff filing is basically insensitive to customer demand forecasts because it develops the fully assigned cost to provide one unit of demand." BellSouth Reply to Telenet's Petition to Reject at 6. Moreover, "the shelf and bay costs . . ., which are the only items of equipment which are shared by more than one port, have been adjusted to reflect less than maximum usage through the application of a fill factor." *Id.* at 4.

[11] *See* BellSouth Semi-Annual Earnings Reports (showing total revenues of no more than $16,000 from X.25 to X.75 protocol channel interface arrangements in any six-month period between July 1986 and February 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION
Revisions to Tariff
F.C.C. No. 103

Transmittal No. 680

ERRATUM

Released: December 8, 1989

1. The Memorandum Opinion and Order, FCC 89-295, released November 3, 1989, in the above-captioned matter is corrected as follows.

2. The second to last sentence of note 4 is corrected to read: "The current tariff precludes customers taking voice grade service pursuant to seven-year contracts from rolling them over to IBS service because there is no provision for seven-year IBS contracts."

3. The last sentence in paragraph 19 is corrected to read: "Therefore, we are not compelled to reach the same conclusion as in Caribnet."

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-29

In the Matter of

Amendment of Section 73.202(b), RM-5798
Table of Allotments,
FM Broadcast Stations.
(Anchorage, Alaska)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 22, 1989; Released: December 11, 1989

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration[1] of the *Report and Order*, 4 FCC Rcd 2060 (1989), which substituted FM Channel 277C2 for Channel 276A at Anchorage, Alaska, and modified the license of Station KXDZ(FM), accordingly, as requested by Korlyn Broadcasting, Inc. ("KBI"). The petition was filed by Peninsula Communications, Inc. ("PCI" or "petitioner").[2] PCI requests that we upgrade KBI to Channel 275C2, rather than Channel 277C2. PCI and KBI filed supplemental comments in which KBI indicated its support of PCI's reconsideration request. [3]

2. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Anchorage, Alaska	225C,247C1,251C1,255C1, 263C2,267C,271C,275C2, 281C1,287C1,293C,298C

3. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Korlyn Broadcasting, Inc. for Station KXDZ(FM), IS MODIFIED effective **January 24, 1990,** to specify operation on Channel 275C2 in lieu of Channel 277C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

4. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this Order by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Korlyn Broadcasting, Inc., 800 E. Dimond Blvd., Suite 3-395, Anchorage, AK 99515 and to Peninsula Communications, Inc., P.O. Box 103, Homer, AK 99603.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas Webbink
Acting Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the petition was given April 21, 1989, Report No. 1777.

[2] PCI is the licensee of Stations KWVV-FM and KGTL(AM), Homer, Alaska, KPEN-FM, Soldatna, Alaska, as well as eight FM translator stations rebroadcasting KWVV-FM and KPEN-FM.

[3] The supplemental comments, styled as a "Joint Petition for Reconsideration," were not requested by the Commission. However, in the absence of any opposition, no prejudice will result from their acceptance for the sole purpose of entertaining KBI's support of the reconsideration proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-390

In the Matter of

Amendment of Section 73.202(b), RM-6302
Table of Allotments,
FM Broadcast Stations.
(Coosa, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 22, 1989; Released: December 11, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5013 (1988), issued in response to a petition filed by Steven L. Gradick (petitioner). The *Notice* proposed the allotment of FM Channel 237A to Coosa, Georgia, as that community's first local FM service. Petitioner filed comments restating his intention to apply for the channel, if allotted. No other comments were received.

2. As stated in the *Notice*, Channel 237A can be allotted to Coosa, Georgia, in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.4 kilometers[1] south to avoid a short-spacing to unoccupied but applied for Channel 239A at Trion, Georgia.

3. We believe the public interest can be served by the allotment of Channel 237A to Coosa, Georgia, as that community's first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Coosa, Georgia	237A

4. The window period for filing applications will open on **January 25, 1990,** and close on **February 26, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Coosa are North Latitude 34-13-54 and West Longitude 85-21-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-560

In the Matter of

Amendment of Section 73.202(b), RM-6952
Table of Allotments,
FM Broadcast Stations.
(Dillingham, Alaska)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1989; Released: December 11, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Jackson McCormick (petitioner) proposing the allotment of FM Channel 256A to Dillingham, Alaska, as that community's first local FM broadcast service. Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering analysis of the proposal reveals that Channel 256A can be allotted to Dillingham in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1]

3. In view of the fact that Dillingham could receive a first local FM broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Dillingham, Alaska	--	256A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 31, 1990,** and reply comments on or before **February 15, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Jackson McCormick
McCormick Construction & Maintenance
P.O. Box 157
Dillingham, AK 99576

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates used for Channel 256A at Dillingham are 59-02-30 and 158-27-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-563

In the Matter of

Amendment of Section 73.202(b), RM-6953
Table of Allotments,
FM Broadcast Stations.
(Walsenburg, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1989; Released: December 11, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Hargrave Broadcasting Corporation (petitioner), licensee of Station KSPK(FM), Channel 272A, Walsenburg, Colorado, seeking the substitution of Channel 272C3 for Channel 272A, and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 272C3 can be allotted to Walsenburg at the petitioner's present site,[1] in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 272C3 for Channel 272A at Walsenburg, Colorado. In accordance with established Commission policy, we will propose to modify the Class A permit of Station KSPK(FM), as requested by petitioner, in the event Channel 272C3 is substituted for Channel 272A at Walsenburg. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 272C3 at Walsenburg.

4. Accordingly, in order to provide Walsenburg with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Walsenburg, Colorado	272A	272C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 31, 1990,** and reply comments on or before **February 15, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Julia L. Frey, Esq.
Lowndes, Drosdick, Doster,
Kantor & Reed, P.A.
214 North Eola Dr.
Orlando, FL 32801

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility, Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates at the petitioner's present site are 37-37-39 and 104-49-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-561

In the Matter of

Amendment of Section 73.202(b), RM-6968
Table of Allotments,
FM Broadcast Stations.
(Veedersburg, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1989; Released: December 11, 1989

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Christian Family Radio (petitioner) seeking the allotment of FM Channel 225A to Veedersburg, Indiana, as that community's first local broadcast service. Petitioner stated its intention to apply for the channel if allotted.

2. A staff engineering analysis reveals that Channel 225A can be allotted to Veedersburg, Indiana, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1]

3. In view of the fact that Veedersburg could receive a first local broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Veedersburg, Indiana	--	225A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 31, 1990,** and reply comments on or before **February 15, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

James M. Weitzman, Esq.
Kaye, Scholer, Fierman,
Hays & Handler
901 - 15th Street, NW
Suite 1100
Washington, DC 20005

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates used for Channel 225A at Veedersburg are 40-06-47 and 87-15-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-562

In the Matter of

Amendment of Section 73.202(b), RM-6951
Table of Allotments,
FM Broadcast Stations.
(Guntersville, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1989; Released: December 11, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Guntersville Broadcasting Company, Inc. (petitioner), licensee of Station WTWX-FM, Channel 240A, Guntersville, Alabama, seeking the substitution of Channel 240C3 for Channel 240A and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 240C3 can be allotted to Guntersville at the petitioner's suggested site 8.9 kilometers (5.5 miles) east[1] of the community in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 240C3 for Channel 240A at Guntersville, Alabama. As requested, we also propose to modify the Class A license of Station WTWX-FM to specify operation on Channel 240C3. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 240C3 at Guntersville.

4. Accordingly, in order to provide Guntersville with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Guntersville, Alabama	240A	240C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 31, 1990,** and reply comments on or before **February 15, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Mark E. Fields, Esq.
Miller & Fields, P.C.
P.O. Box 33003
Washington, DC 20033

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates at the petitioner's suggested site for Channel 240C3 at Guntersville are 34-23-03 and 86-12-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-95

In the Matter of

Communications Satellite
Corporation

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 1989; Released: December 11, 1989

By the Commission:

I. INTRODUCTION

1. In an Order released April 6, 1987, in CC Docket Nos. 80-634 and 85-268, the Common Carrier Bureau tentatively concluded that the Communications Satellite Corporation (Comsat) must refund $61.7 million in revenues accrued in 1983-86 which exceeded a 1978 rate of return prescription.[1] After considering the record and the unique factual circumstances presented, this Commission released an Order on January 28, 1988, limiting Comsat's refund liability to revenues accrued by Comsat during the period from August 1, 1984, to December 31, 1986, in excess of its 1978 Settlement Agreement prescription.[2] This Commission's *January 1988 Order* mandated refunds totaling approximately $39 million, to be refunded as a lump sum. [3] A Common Carrier Bureau Order released February 26, 1988,[4] established this docket and deferred Comsat's disbursement obligation pending resolution of two issues: the methodology for allocating refunds among entitled customers, and whether carrier customers should be required to flow through such refunds to end users.[5] The former issue, the calculation of allocation amounts, was addressed in a Bureau Order released June 28, 1989.[6] We accordingly consider here only the question of the flow-through of refunded amounts.

II. SUMMARY OF PLEADINGS

A. Comments

2. Of Comsat's carrier customers, only AT&T agrees without demur to flow through the Comsat refund to end users.[7] Citing Section 201(c)(5) of the Satellite Act, 47 U.S.C. § 721(c)(5), AT&T submits its plan to initiate short-term international message telephone service (IMTS) rate discounts, targeted to specific countries and days of the week, in order to flow through the refund benefit to ratepayers.[8] AT&T states that it will complete its flow-through within 12 months after our issuance of an Order affirming its proposed methodology. AT&T Comments at 6-7.

3. The other carrier customers uniformly argue that this Commission cannot and should not order flow-through of the Comsat refund. Western Union argues that a decision to impose a flow-through requirement would be arbitrary and capricious, as this Commission has failed to support or justify such a requirement. Western Union Comments at 6-7. Commenters state that this Commission's reference to previous Comsat refund flow-throughs is not pertinent because those flow-throughs were made voluntarily and by agreement. FTCC Comments at 2-3; RCAGC Comments at 22-26; TRT Comments at 8-9; Western Union Comments at 6.[9] These parties argue that this Commission has no basis for ordering a flow-through by non-dominant carriers. MCI Comments at 3-4; TRT Comments at 7-9; Sprint Comments at 4.

4. This Commission should rely on the market to force rate reductions that will reflect cost reductions, some carrier customers assert. FTCC Comments at 3; RCAGC Comments at 28-29; Western Union Comments at 11. These parties contend that a flow-through requirement would be inconsistent with this Commission's previously expressed pro-market, pro-competitive policies. MCI Comments at 5-8; Sprint Comments at 3-4. Further, they maintain, this Commission has no legal authority to order such flow-throughs, which constitute retroactive ratemaking and might even result in confiscatory rates. MCI Comments at 9-10; RCAGC Comments at 5-14; Western Union Comments at 7. According to the carrier customers, such a requirement would violate the filed rate doctrine. FTCC Comments at 4; Western Union Comments at 7-8. In addition, these parties aver, before a flow-through can be ordered, this Commission must show that a carrier has experienced over-earnings; they claim that we have not shown, and could not show, overearning by these carriers in this case. MCI Comments at 4-5; Sprint Comments at 4.

5. Further, the carrier customers argue, the administrative costs involved in a flow-through would be immense, and beyond that, an accurate flow-through calculation might well be completely impracticable. FTCC Comments at 4; MCI Comments at 12-13; RCAGC Comments at 30; TRT Comments at 13-15; Sprint Comments at 4-5; Western Union Comments at 11-13.[10] They further contend that, because administrative costs are so high, and the amounts actually refunded so low, the benefit to the ratepayer would be, at best, minimal. *Id.* In these circumstances, commenters argue, a flow-through requirement would be inherently unfair. FTCC Comments at 4-5; Western Union Comments at 9.

6. Several carrier commenters also note the likelihood of a severe chilling effect on carriers' future participation in this Commission's review of rates if they are required to flow through the Comsat refund. They assert that carriers will be unwilling to provide the Commission with assistance in oversight and review if these carriers will not only receive no benefit from their efforts, but also be required to bear additional administrative burdens in order to pass the benefits along to others. As Western Union expresses it, "the Commission will have effectively muzzled its own watch-dog." Western Union Comments at 13; *see also* TRT Comments at 18. In response to the *April 1987 Order*, however, several of these commenters do propose flow-through calculation methodologies. *See, e.g.*, FTCC Comments at 5-6; MCI Comments at 15-17. Several carriers argue that should this Commission decide that a

flow-through of the Comsat refund is required, it should be made retroactive rather than prospective, to minimize market disruption and losses to carriers.[11]

7. Finally, the Networks argue that we should direct Comsat to calculate the exact amount owed to each carrier customer, and direct carrier customers to pass through to end users on a dollar-for-dollar, lump sum, retrospective basis. Networks Comments at 4-5. The Networks argue that this mandate is especially important for television services, as intermediary carriers are merely agents for broadcasters, providing no service, and broadcaster end users are few in number and readily identifiable. *Id.* at 5, 7. Broadcasters can facilitate international service only via Comsat, they argue, and no competitive factors operated to force the intermediaries to absorb Comsat's overcharges. *Id.* at 6.

B. Replies

8. DOD states in its reply comments that applicable law, including specifically the Satellite Act, and Commission precedent require that the Comsat refund be flowed through, in its entirety, to users of the satellite system. DOD Reply at 1-2, 4.[12] MCI disagrees, and states that the statute in question does not mandate, or even allow, a flow-through requirement. MCI Reply at 2-3.[13] MCI asserts that this Commission, in order to ensure that the benefits of satellite technology are reflected in the rates of all carriers as the Satellite Act requires, should permit the non-dominant carriers to use the refunds to which they are entitled in a manner consistent with competition in the marketplace. *Id.* at 3.[14]

9. DOD further asserts that the carrier parties' arguments mischaracterize the money in question as being part of their own earnings during the time periods in question, while the money is in fact a single refund, from Comsat to the customers. Thus, DOD contends, arguments about underearnings and retroactive ratemaking are beside the point. *Id.* at 2, 3-4.[15] DOD agrees with the Networks' statement that "the flow-through of refunds is not dependent upon a finding that the intermediary carriers achieved 'excess earnings' because the intermediary carriers are required to flow through only the refunds they actually receive from Comsat." *Id.* at 3 (quoting Networks' Comments at 6 n.18). RCAGC argues, however, that the Satellite Act's "general encouragement to reflect economies prospectively in rates could hardly expand the Commission's refund authority to force a carrier earning less than a reasonable return and charging below cost rates to make refunds to its customers, no matter what the source of the refund may be." RCAGC Reply at 4.[16]

10. DOD asserts that the carriers' claims of low rates of return are not persuasive in exempting them from any flow-through requirement, since that requirement is not predicated on their earning an authorized rate of return. Further, DOD states, even if this Commission wishes to consider a carrier's impoverishment, the carrier must also demonstrate that it actually absorbed the expense of the Comsat overcharges, since the purpose of this proceeding is reimbursement of those parties victimized by the excess charges, not general revenue redistribution. DOD Reply at 7-8.[17] DOD also rejects the carriers' arguments that non-dominant, non-regulated carriers should not be made to flow through the refund, and that the administrative burden outweighs other considerations. *Id.* at 8-9. Finally, DOD cites cases in other regulated industries that support its assertion of a flow-through requirement. *Id.* at 9-11.[18]

11. DOD responds to the carriers' arguments that the 1978 refund flow-through was voluntary, and thus not precedent for the instant matter, by noting that the "voluntary" payment arrangements were reached after this Commission determined that a flow-through was required. *Id.* at 4-7 (citing Communications Satellite Corporation, 56 FCC 2d 1101, 1187 (1975)).[19]

12. MCI takes issue with the Networks' argument that carriers are simply agents in the procurement of space segment on behalf of the broadcasters. MCI Reply at 4-5.[20] The Networks contend, however, that no party has effectively refuted the validity of their assertion. Networks' Reply at 3.[21]

13. With respect to AT&T's flow-through proposal,[22] DOD asserts that it seems to guarantee that ratepayers would not be reimbursed in proportion to their contribution to the excess earnings. *Id.* at 13.[23] MCI also asserts that the AT&T proposal must be rejected, since AT&T is proposing to make temporary rate reductions on short notice to strengthen its market power. MCI Reply at 6.[24]

14. DOD suggests that equity requires a balancing of two principles: that ratepayers should be reimbursed for the excessive charges they paid, and that administrative costs should be kept within reason. *Id.* at 14.[25] Finally, DOD asserts that administrative expenses should be paid by Comsat. *Id.* at 17-18.

15. In its pleading responding to DOD's reply, MCI argues that the precedent cited by DOD is inapplicable, its underlying assumptions are false, and its conclusions are inaccurate. MCI Supplemental Comments at 1-5. RCAGC also filed a response to DOD's reply,[26] and asserts that RCAGC itself, and not its end-user customers, bore the costs of the illegal Comsat charges, and is thus entitled to retain the refund. RCAGC Response at 1-2. It is DOD's failure to understand this basic fact, RCAGC avers, that invalidates the entire DOD argument. *Id.* at 3-5. RCAGC also contends that the cases cited by DOD support RCAGC's argument that a flow-through is not appropriate if the intermediate carrier has earned less than a reasonable return, taking the refund into account. *Id.* at 2, 6-11.[27]

III. DISCUSSION

16. We need not reach all of the questions that have been discussed in the comments because we have decided that we should not prescribe a flow-through formula for non-dominant carriers that received Comsat services. In this regard, we find merit in the assertions by MCI, Sprint, TRT, and others[28] that, with respect to the relatively modest refund amounts involving Comsat's non-dominant carrier customers, the administrative costs of locating and making lump sum payments to end users are substantial, and would be disproportionate to the actual refunds.[29]

17. The record shows that, according to Comsat's calculations, approximately 170 different Comsat customers are to share the refund from Comsat.[30] With the exception of AT&T, which Comsat calculates should receive approximately 74 percent of the refund total, only three carrier customers are to receive even $1 million from Comsat. Moreover, none of the non-dominant carrier cus-

tomers were subject to accounting orders during the periods relevant to this investigation, and therefore detailed billing records have not been retained. In addition, a number of Comsat's refund recipients have experienced mergers or other forms of corporate reorganization, which create added uncertainty as to which end users would appropriately be entitled to any further flow-through of the refund amounts.[31] In light of all these factors, we conclude that, in this instance, the costs of requiring nondominant carrier customers to flow through their refunds to end users would outweigh the benefits of such an effort, and that such a requirement would not be in the public interest.

18. We are not persuaded that the Networks are significantly different from other end users. We conclude that the distinctions are not so substantial as to justify different treatment for the Networks than for other Comsat customers. That is, when the Networks have contracted directly with Comsat or when they have been customers of AT&T, they will receive a refund. When they have contracted for service with a non-dominant carrier, however, the Networks, like other end users, will receive no direct payback from the Comsat refund.

19. The initiation of incentive regulation ("price caps"), which contains new procedures for flowing through cost changes, including refunds, renders moot the precise methodology AT&T proposed for flowing through the Comsat refund.[32] The *Price Cap Order* stated that adjustments to AT&T's price cap index (PCI) and actual price index (API) should be made in order to reflect the results of investigations or complaints against rates.[33] Depending upon the results of the investigation or complaint, one or both of the index levels would be affected.[34] In the present case, the flow-through obligation we are imposing on AT&T stems from the Commission-imposed reduction -- through the mechanism of a lump sum refund -- in the rates Comsat charged to AT&T during 1984 through 1986 for transmitting switched traffic internationally. We believe that this decline in cost AT&T will experience should be treated as an exogenous cost affecting AT&T's PCI levels.[35] Pursuant to the price cap rules, AT&T must therefore implement a cost causative distribution of this one-time exogenous cost decrease among its baskets.[36] AT&T must then make any rate revisions necessary to ensure that its API levels remain at or below the adjusted PCI levels. In making rate reductions that may be required to comply with the adjusted PCI, AT&T should target proportionately those services which were affected by the Comsat overcharges.[37] AT&T is accordingly directed to file tariff revisions, not later than 30 days after the release of a Bureau order directing Comsat to disburse the refund sums from escrow, that effect a flow-through consistent with these guidelines. Those AT&T tariff revisions will be accompanied with supporting materials demonstrating compliance with this Order.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that AT&T SHALL FILE no later than 30 days after the release date of a Bureau order directing Comsat to effect the refund payments, tariff revisions consistent with this Order.

21. IT IS FURTHER ORDERED that the non-dominant carrier parties here before us SHALL NOT BE REQUIRED to flow through to their end-user customers any funds paid to them by Comsat in satisfaction of Comsat's refund obligation as established by this Commission.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, 2 FCC Rcd 3706 (1987) (Com.Car.Bur. *April 1987 Order).* The *April 1987 Order* directed Comsat to show cause why the excess revenues should not be refunded and to propose a refund schedule and methodology for public comment, in the event excess revenues were ultimately refunded. Comsat responded to the *April 1987 Order* by asserting that its refund obligation was unfounded in law, and in any case was overstated. Comsat also submitted, on July 10, 1987, a proposed refund methodology and schedule, which suggested allocating refunds based on customers' contributions to Comsat's jurisdictional revenues during the refund period. The refund period includes August 1984 to July 1985 (when Comsat World Systems Division provided both space and earth segment services) and July 1985 to August 1986 (when Comsat Intelsat Satellite Services (ISS) provided space segment services, and Comsat International Communications, Inc. (CICI) provided earth segment services). The amount of refund per customer would be determined based on the ratio of the amount received by the Comsat entities from such customer, to the total received from all customers, for the relevant periods. Comsat asked this Commission to specify a methodology, and to rescind our directive that Comsat pay refunds to its end-user customers before paying refunds to its carrier customers. For complete background on this matter through the present proceeding, *see* Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, Memorandum Opinion and Order, 3 FCC Rcd 2643, 2644-45 (1988) (*January 1988 Order).*

[2] *January 1988 Order*, 3 FCC Rcd at 2644.

[3] *Id.* at 2649.

[4] Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, 3 FCC Rcd 1130 (Com.Car.Bur. 1988) (*February 1988 Order).*

[5] Comments were filed in February 1988 by American Telephone and Telegraph Company (AT&T), American Satellite Company d/b/a Contel ASC (Contel), FTC Communications, Inc. (FTCC), MCI Communications Corporation (MCI), Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. (Networks), RCA Global Communications, Inc. (RCAGC), TRT Telecommunications Corporation (TRT), Turner Broadcasting System, Inc. (Turner), US Sprint Communications Company (Sprint), and WU World Communications Inc. and Western Union Corporation (Western Union). Reply comments were filed by AT&T, Comsat, the Department of Defense (DOD), MCI, the Networks, and RCAGC.

MCI filed a Motion To Strike in Part, or To Accept Supplemental Comments, and both MCI and RCAGC filed supplemental replies in response to the DOD reply comments. DOD moved to strike these supplemental pleadings. MCI argues that DOD's pleading does more than "reply" to the comments; rather, MCI argues, DOD makes initial arguments and includes

new material that should not be accepted without an opportunity for reply by interested parties. DOD submitted a response to the MCI and RCAGC pleadings that replied to DOD's reply comments. DOD argues that all matters raised in its reply comments were direct responses to arguments of the carriers in their initial comments, and that it has complied with all Commission procedures. DOD therefore asserts that its reply comments should not be stricken or rejected. We find that DOD's pleadings are responsive to the issues raised, but that they do present new arguments that merit an opportunity for response by these parties. Accordingly, we are accepting and considering the DOD reply, and the MCI and RCAGC supplemental pleadings. MCI's and DOD's motions to strike are therefore denied.

[6] Communication Satellite Corporation, CC Docket No. 88-95, Memorandum Opinion and Order, 4 FCC Rcd 5230 (Com.Car.Bur. 1989) (*Allocation Order*).

[7] AT&T states that its share of the Comsat refund is $29.070 million, or approximately 74 percent. AT&T Comments at 3.

[8] *Id.* at 3-5. According to AT&T, these reductions would be used to demonstrate to foreign correspondents the demand stimulation effect of lower rates, and to urge accounting rate reductions, as well as to identify latent IMTS demand.

[9] At least two of the parties, Western Union and TRT, note numerous and significant differences between the present circumstance and the earlier one on which the *January 1988 Order* seems to rely: the earlier case involved a Comsat refund of over half of its revenues, while this case involves less than 6 percent. Moreover, they argue, the 1978 case involved a market with only limited, incipient competition; now, competition is viable and growing. They also argue that the carriers making flow-throughs in 1978 were fully regulated entities; now they are non-dominant carriers. Finally, they argue that those carriers had notice, in the earlier case, that flow-throughs would be required or encouraged, and so were able to organize their bookkeeping to retain billing records and other relevant documentation. This is not the case, they argue in the present proceeding, and the absence of documents would add greatly to the administrative impracticability of making flow-throughs. *See, e.g.*, TRT Comments at 9-16.

[10] Some of these parties argue that carriers should be permitted to recover costs of participation in proceedings that led to the refund obligation. *See id.*

[11] *See, e.g.*, TRT Comments 4-7. MCI similarly argues, however, that a flow-through order cannot implement lower future rates, but must require either a refund to those customers that overpaid during the period in question, or a one-time payment to current customers. MCI Comments at 12.

[12] Section 201(c)(5) of the Satellite Act instructs this Commission to:

> prescribe such accounting regulations and systems and engage in such ratemaking procedures as will insure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communication services.

47 U.S.C. § 721(c)(5).

[13] RCAGC argues that only two commenters in this proceeding support a flow-through, that neither addresses the statutory or equitable defects of such a requirement, and that the resultant "silence" of the record requires that Comsat's non-dominant carrier customers be permitted to retain their refunds from Comsat. RCAGC Reply at 1. RCAGC also argues that earlier flow-through cases are factually distinguishable from the instant case. *Id.* at 5.

[14] MCI also reiterates its argument that any flow-through requirement would be an abandonment by this Commission of our policies regarding competition and non-dominant carriers. *Id. at 4.*

[15] RCAGC argues that, in equity, this Commission must not order flow-through of refunds from Comsat's carrier customers, when we have reduced Comsat's refund obligation in recognition that economic conditions made the full refund inequitable. RCAGC Reply at 7. RCAGC asserts that if equitable considerations require that Comsat be allowed to retain some of its illegal overcharge, then equity equally requires that non-dominant carriers be permitted to retain their share of the refund if that share leaves their rate of return still depressed below a reasonable level. *Id.*

[16] RCAGC also takes issue with the Networks' argument that carriers must flow through "only the refunds they actually receive from Comsat," stating that the Networks have missed the point. *Id.* at 6.

[17] DOD discusses this issue in some depth, particularly as regards RCAGC's claims of underearning. DOD Reply at 11-12. DOD argues that, if this Commission wishes to base a flow-through requirement on the carriers' earnings, the carriers would have to demonstrate both that they failed to earn a reasonable rate of return (not that they did not earn excessive rates of return) *and* that they absorbed the excessive Comsat costs themselves. *Id.* at 12.

[18] DOD states that the flow-through issue arises more frequently in rate cases involving natural gas, and that the sections of the Natural Gas Act relating to refunds are virtually identical to those of the Communications Act. DOD Reply at 10. DOD cites *FPC v. Interstate Natural Gas Comp.* for the proposition that the refund should be distributed to the party that bore the burden of the excessive rates, and that it cannot be assumed that the intermediary will pass down the benefits of a refund to the ultimate consumer. *Id.* (citing *FPC v. Interstate Natural Gas Co.*, 336 U.S. 577 (1949)). DOD also argues that the court has found that the Natural Gas Act's purpose of serving the public interest authorizes the Federal Power Commission to distribute refunds to the public rather than to intermediate carriers, which the court acknowledged had absorbed the excessive charges. *Id.* at 11 (citing *Texas Eastern Transmission Corp. v. FPC*, 414 F.2d 344 (5th Cir. 1969), *cert. denied*, 398 U.S. 928 (1970); *Public Service Comm' n of the State of New York*, 543 F.2d 757 (D.C. Cir. 1974)).

[19] DOD also cites a 1978 Commission decision as affirming the flow-through requirement, and a third decision as denying a challenge to the flow-through requirement. DOD Reply at 6 (citing Communications Satellite Corporation, 68 FCC 2d 941, 952 (1978); Communications Satellite Corporation, 70 FCC 2d 1449, 1453 (1979)).

[20] MCI describes the service it offers to broadcasters in its international television and associated audio service. *Id.* at 5. MCI asserts that if TV customers choose to continue to receive TV services from an international carrier, rather than obtaining them directly from Comsat, these customers should be treated no differently from the carrier's other end-user customers. *Id.* at 6.

[21] The Networks state that, no matter how this Commission decides to treat the refunds received by intermediary carriers for other international services, we should require these carriers to flow-through refunds attributable to international television service to their end-user customers on a dollar-for-dollar, lump sum basis.

[22] DOD also evaluates the flow-through proposals of the various non-dominant carriers as offered in their comments -- an evaluation which, in view of our determination not to require flow-throughs from these carriers, we will not summarize here.

[23] DOD also terms AT&T's proposal "an unlawful delegation of ratemaking authority to the carrier." *Id.* at 16. DOD criticizes AT&T for proposing to omit large private line users from its reimbursement program, and states that the AT&T proposal manipulates the Comsat refund to enhance AT&T's own long distance services rather than to reimburse the ratepayers who paid excessive tariffs for nearly two and one-half years. *Id.* at 17.

[24] Characterizing AT&T's proposed rate reductions as "discriminatory," MCI states that AT&T is seeking to engage in pricing strategies that are neither cost-based nor justified by existing competition. MCI Reply at 7.

[25] DOD suggests, for example, that we might establish a threshold below which a different, simpler standard of flow-through allocation might apply; that private line customers should be reimbursed on actual individual use; and that FTCC's allocation methodology should apply for services such as IMTS where proportional reimbursement is justified.

[26] RCAGC also argues that DOD's comments break new ground and do not qualify as "reply" comments.

[27] The underlying fact, according to RCAGC, is that a carrier earning less than a reasonable rate of return, including the refund, has not passed all of its costs along to the end user, and so should not be required to pass the refund along either. RCAGC Response at 2.

[28] *See* para. 5, *supra*.

[29] The non-dominant carriers urge that the administrative costs of locating and paying customers be recouped from the refund pool if flow-through is required; FTCC asserts that Comsat should bear such costs. Because we have concluded that no flow-through will be required by non-dominant carriers, we need not decide this issue.

[30] *See* Letter from Stephen L. Goodman, Comsat, to Secretary, FCC, dated October 25, 1989.

[31] *See, e.g.*, Letter from Robert E. Conn, Counsel for World Communications, Inc. to Allen E. Flower, Comsat, dated September 5, 1989; Motion to Strike or Request for Declaratory Ruling of Western Union Corporation, filed Sept. 14, 1989; Statement of Position of World Communications, Inc., filed Sept. 25, 1989.

[32] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (*Price Cap Order*).

[33] *Id.* at 3077 (para. 413).

[34] *See also id.* at 3019 (para. 299) (stating that future regulatory decisions about changes in AT&T costs should also include a determination about whether the cost change will be treated as an exogenous cost affecting AT&T's PCI levels).

[35] *See* 47 C.F.R. § 61.44(c)(5), *printed at* 4 FCC Rcd at 3326.

[36] *See* 47 C.F.R. § 61.44(c) ("Exogenous cost changes . . . attributed to price cap services shall be . . . apportioned on a cost-causative basis among price cap baskets."). Since the lump sum Comsat refund reduces AT&T's costs immediately by a finite amount but has no continuing prospective impact on AT&T's costs, we believe that the exogenous cost adjustment reflecting the refund, should in effect be amortized over a year. This can be accomplished through an offsetting exogenous cost adjustment to be implemented one year after the initial adjustment.

[37] *See, e.g., Price Cap Order* at 3012-13 ("We would . . . give serious consideration to a petition for investigation of a below-cap rate filing, or to a complaint, if it appeared that cost [changes] . . . had been applied to . . . service[s] in a manner so manifestly unfair as to render rates for that service possibly unreasonable.").

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 88-441

In the Matter of

Advanced Technologies for the
Public Safety Radio Services

FURTHER NOTICE OF INQUIRY

Adopted: November 28, 1989; Released: December 11, 1989

By the Commission:

I. INTRODUCTION

1. On September 7, 1988, we released a *Notice of Inquiry* (*Notice*) [1] to obtain public comment on the matter of trunking compatibility protocol standards for radio equipment operating in the 821-824/866-869 MHz public safety bands. In that *Notice*, we examined the possibility of establishing standards to increase interoperability among licensees using different types of trunked radio systems. After careful consideration of the comments, we determined that federally-mandated trunking standards were not needed to provide adequate interoperability among 800 MHz public safety entities.[2]

2. Our conclusion was based in part upon our awareness that users of analog-based radio systems can communicate with one another if they transmit on the same frequency and operate in the non-trunked (conventional) mode. We also recognized, however, that the next generation of radios is likely to use digital modulation and transmission techniques, and that digital systems may require some degree of standardization to enable system interoperability. We have initiated this inquiry to explore the important issue of standards as well as the many other technical, economic, and regulatory issues that relate to the use of these advanced technologies in the public safety services.

II. BACKGROUND

3. In 1983, Congress directed us to develop a plan to ensure that the electromagnetic spectrum requirements of state and local public safety authorities would be considered in the allocation of spectrum. [3] In response to this directive, we allocated the 821-824/866-869 MHz bands for use by the public safety services[4] and adopted the National Plan for Public Safety that established the policies, procedures, and rules to govern this spectrum.[5] We decided not to mandate trunking standards for equipment operating in the 800 MHz public safety bands because such standards were not necessary in the public safety services.[6] We also concluded that public safety concerns about interoperability and future spectrum requirements could best be addressed through an examination of the various issues surrounding the use of advanced radio communications technologies. This *Further Notice of Inquiry* (*Further Notice*) is being initiated to explore these issues.

III. PURPOSE

4. Currently, mobile radio systems use analog FM technology, which is characterized by the modulation of the radio frequency carrier by an analog waveform and the transmission of that carrier on analog radio channels. Digital radio communication, however, is accomplished by sampling and encoding the analog waveform, or simply starting with digital information, and modulating the carrier with the resultant digital values. Digital technology is already replacing older technologies in many different areas. In the communications field, digital switches and circuits are becoming commonplace in telephone networks, and in the audio industry digital compact discs (CDs) are competing with analog-based records and cassette tapes. Given this apparent movement toward digital by many industries, the question becomes whether and when the public safety community will adopt digital radio technology, and if it does, what the Commission's role should be in developing this or other advanced technologies for the public safety services. The purpose of this *Further Notice* will be to provide a framework for the thorough exploration of these issues. We pose a number of questions in this *Further Notice* and ask that comments be clearly identified with specific questions. We are hopeful that these questions will help the industry focus on the issues and help us identify the proper direction for the Commission to take in this area.

IV. ISSUES

Digital vs. Analog

5. Analog FM has been used in mobile radio systems for over 50 years. Digital technology, however, may offer a number of significant features that could enhance mobile radio communications. In the following questions, we focus on the various advantages and disadvantages that may result from digital technology and attempt to determine whether a conversion to digital would be appropriate in the near future for the public safety services.

Spectrum Efficiency

6. One of the most significant advantages offered by digital is the capability for increased calling capacity through the use of various multiple access techniques.[7] At the same time, future advancements in analog technologies could also increase capacities to satisfy the spectrum requirements of the public safety services. The following questions focus on the use of these different technologies to achieve spectrum efficiency.[8]

Question 1:

a. Will future advancements in analog technologies[9] (*e.g.*, reduced channel bandwidths) enable a degree of spectrum efficiency equivalent to that of digital? Explain why or why not.

b. Can we expect significant advances in analog technologies in the future, or will most future industry research and development efforts be directed toward digital?

c. Even if advances in analog technology are possible, would the public safety community be better off focusing on digital rather than analog because of the specialized needs (*e.g.*, encryption, data transmission) of that community?

Question 2:

a. What increases over current call-carrying capacity could be anticipated using digital TDMA, FDMA or CDMA technologies?

b. Digital transmissions are currently permitted on public safety channels. How might the design characteristics (*e.g.*, bandwidth, modulation, emissions) of these channels be modified to permit effective digital voice communications?

c. Which access technique (FDMA, TDMA, or CDMA) would best provide the voice quality and system performance needed to satisfy the operational requirements of public safety users? Explain.

d. Among the various spread spectrum techniques (*e.g.*, frequency hopping, direct sequence), which might be best for public safety use? Explain.

Operational Features

7. In addition to providing increased communications capacity over current analog based systems, digital technology could also offer a number of other operational advantages. These could include 1) improved data transmission capability, 2) easier interconnection with digital networks, 3) more secure communications, 4) more efficient repeater operation, and 5) superior transmission in the mobile environment. The following questions focus on how digital might be able to enhance mobile communications capabilities and whether such improved system performance would benefit the public safety user.

Data Transmission

Question 3:

a. What are the data transmission capacities of the existing public safety channels? Is this performance satisfactory given the increasing amount of computer-based information exchange taking place in land mobile applications?

b. Could channels designed to better accommodate digital transmissions permit higher data rates? What data rate increases could be expected using such channels?

c. Would data rate increases be important to public safety licensees that currently use mobile data systems?

Interconnection

The Public Switched Telephone Network (PSTN) is moving towards becoming all-digital. Also, in the future, Integrated Services Digital Networks (ISDN) will enable the transmission of many types of communications services (voice, video, data) over a single communications channel.

Question 4:

a. Will interconnection with these networks be important to the public safety user?

b. Could such interconnection be accomplished effectively with analog radio systems?

c. Will the use of digital enable more compatible or less costly interconnection?

d. Can or should digital standards for public safety use be fully compatible with ISDN standards?

Secure Communications

Various techniques are in use today that permit the encryption of analog signals. These include low level "scrambler" techniques as well as more sophisticated digital encryption methods.[10]

Question 5:

a. With the increasing use of covert operations by public safety agencies, do current encryption techniques provide the level of security and voice quality needed for effective, secure communications?

b. Would greater efficiency or a higher level of security be attainable by applying digital encryption techniques to *digital* radio systems?

Repeater Operation

Question 6:

Many public safety systems use repeaters to extend coverage areas. Could digital "regenerative" repeaters enable greater spectrum efficiency (*e.g.*, through the use of lower powered transmitters) as well as more accurate transmission of information? If so, explain how.

Performance in the Mobile Environment

All radio signals, whether analog or digital, are subject to various types of degradation in the mobile environment (*e.g.*, shadowing, multipath fading, man-made noise, co-channel interference). Digital transmission, however, could provide more resistance to these effects through the use of robust voice coding and modulation schemes, and through various techniques (such as adaptive equalization and error correction) that are not available with analog systems.

Question 7:

a. Can digital provide greater resistance to noise and interference than analog transmission and thus permit lower C/I (or C/N) ratios at the point of reception? If so, could this enable lower transmitter powers or closer mileage separations that could result in greater frequency reuse?

b. Does digital suffer from any particular performance deficiencies in the mobile environment?

c. Voice recognition is important in the public safety services. How does the voice quality and intelligibility of digital compare with analog systems (*e.g.*, NBFM, ACSB)? Is digital voice quality satisfactory for public safety communications?

Note : For Questions 3, 4, 5, 6, and 7 please describe any performance differences that could result from the use of different access methods (CDMA, TDMA, FDMA) or different digital design parameters (*e.g.*, channel bit rate, voice coding technique, modulation scheme).

Economic Considerations

8. One of the most important factors that will influence the possible conversion of the public safety radio services to digital technology will be whether the benefits of adopting digital are worth the cost. This issue is explored in the following questions within the context of three areas: the price of digital radio equipment; the investments by users in embedded analog equipment; the decisions of other land mobile services with regard to digital conversion.

Equipment Cost

Question 8:

a. If and when public safety digital radio equipment is introduced, are digital systems (for either voice communication or data transmission) likely to be more expensive than analog systems? How much more? Will the price of digital drop to the level of analog? When?

b. Would public safety users be inclined to continue using analog until the cost of digital drops to the level of analog equipment, or would they be willing to pay extra for the various operational features that may be offered by digital? How much more?

Investments

Many public safety licensees have invested considerable amounts of money in their mobile radio systems, and others will be purchasing new systems in the next few years as regional public safety plans are developed and licensing begins in the 821-824/866-869 MHz bands.

Question 9:

a. Over what period of time do public safety agencies amortize their investments in radio systems, or alternatively, what is the typical replacement cycle for public safety radio equipment?

b. What is the likelihood that users will be willing to exchange their analog equipment for digital before the analog equipment has to be replaced?

c. If the public safety community decides to adopt digital technology, how long after that time could digital radio equipment be manufactured and made available to users?

Land Mobile Influence

Question 10:

a. What is the likelihood that the private land mobile services (other than public safety) will turn to digital in the near future? When is this likely to occur?

b. Most of the manufacturers involved in the production of public safety radio equipment also produce equipment for the other land mobile radio services. If these services, which represent a significantly larger market to manufacturers than does public safety alone, convert to digital, will the public safety community also switch to digital? Conversely, would a move by the public safety community to digital encourage non-public safety services to adopt digital technology?

c. Should public safety delay adoption of digital until other land mobile digital systems are proven to be effective?

d. Would the public safety community, by delaying entry to digital, benefit significantly from economies of scale (resulting from the mass production of digital components) that could occur as other land mobile digital equipment comes into use? Should (or will) public safety users delay conversion to digital for this reason?

General

9. The following question addresses various key issues relating to the possible conversion to digital radio by the public safety services.

Question 11:

a. Is there sufficient justification, from a technical, economic or operational point of view, for the public safety community to switch from analog to digital, or should public safety, at least temporarily, delay conversion to digital? Explain.

b. If conversion to digital is desirable, should it be mandated through Commission action?

c. Should a specific date be set for conversion to digital?

d. Should digital be required on all public safety bands? On all frequencies within these bands? Only in heavily populated areas, where there is a greater need for spectrum efficiency? In sparsely populated areas too, to ensure compatibility among public safety users?

Digital Technology and the National Public Safety Plan

10. The National Public Safety Plan identifies the various technical standards and specifications to be used in the new 821-824/866-869 MHz public safety bands. The following question deals with the relationship between these specifications and the technical requirements of a public safety digital system.

Question 12:

a. What impact, if any, would the development of a digital capability for public safety have on the implementation of the National Plan (*e.g.*, what effect would mixed use of digital and analog radios have on interoperability)?

b. Should consideration be given, in the development of digital, toward mitigating these possible effects?

c. Could or should the development of digital be limited by any of the technical specifications contained in the Plan (*e.g.*, the Plan's channeling scheme)?

d. Will the development of digital require modifications to the Plan? If so, explain.

Equipment Standards

11. All analog FM radios operating in the conventional mode and on the same frequency can communicate with one another. With digital, however, the various design parameters (bit rate, modulation, voice coding) of systems must be the same to achieve intra- and inter-system interoperability. This suggests that uniformity may be appropriate for public safety digital systems.

12. There are differing views, however, on the necessity of standards. Some believe that standards are needed to give manufacturers the assurance that a fairly long-term market will be available for their equipment and to give users the confidence that compatible replacement equipment will be available for a reasonable time. Some manu-

facturers have stated in other contexts that standardization would enhance competition and the availability of service. They further argue that standardization would lower costs by avoiding parallel development of systems based on different standards, and would increase interoperability, thus avoiding the development of small, balkanized networks separated from each other due to lack of compatibility.

13. Others believe that digital technology is advancing so rapidly that established standards could become obsolete by the time they are implemented, or worse, that standards could freeze technology. One author has observed:

> The key to the problem is the Three-to-Five Year Paradox. The rate of generational technological change today in most of the relevant areas of digital technology, especially coding and modulation design, is about three to five years. Unlike FM transmission, which appeared both technologically stable and against which there were really no competing options in the early 1970s, digital transmission systems are permuted by the dozens. There are probably at least five or six strong contenders in the coding realm. The first half of the paradox holds that in five years time the performance characteristics of today's coders will have been superseded by a factor of two or more. The other half of the paradox is the observation that it would take at least from three to five years to develop, complete, evaluate, specify, and implement a standard for voice coding. The so-called standard would therefore be seriously obsolete by the time it reached the market. There are many other areas of digital signal processing where similar timing probably holds, including error correction and channel coding, adaptive equalization, diversity techniques, and modulation schemes.[11]

14. On the other hand, the next generation of mobile radios may well be "computers with an RF front end" (see comments of the Personal Radio Steering Group in Gen. Docket No. 88-441) with the capability of performing many signal processing functions. Perhaps different format translations and emulations will be performed by the mobile unit itself so that it can operate in different modes. Perhaps the mobile unit will be able to be updated to perform new capabilities in the same way that computers today are updated with new software, expansion boards, and the like.

15. The controversial matter of standards will be central to the development of a digital public safety system. The following questions thus focus on several issues relating to the possible adoption and implementation of standards.

Question 13:

Should digital standards for public safety communications systems be developed?

Question 14:

If standards are developed, which digital design parameters should be standardized?

Question 15:

Could digital technology develop for the public safety services without the establishment of standards?

Question 16:

Are standards necessary to achieve system interoperability?[12]

Question 17:

Would a "flexible standards" approach, which would allow standards to be periodically modified as advances occur in technology, be feasible? If so, explain how such a standard could be implemented.

16. The cellular industry is in the process of selecting standards (*e.g.*, access, modulation, voice coding, channel spacing, signalling) for its digital radio system.[13] If the public safety community adopts digital technologies, similar specifications may have to be selected. The choice of these specifications will be important because it will determine the quality and performance of the public safety digital radio system.

Question 18:

a. Would design parameters adopted for cellular radio be appropriate for public safety communications?

b. If not, what parameters would have to be modified to meet the operational requirements of public safety?

Question 19:

Should digital systems operate in the trunked mode? If so, what system design criteria would be needed to accomplish such operation?

17. In addition to the activities of the cellular industry, the federal government is now working on development of standards for future digital land mobile equipment operating on federal spectrum,[14] and the CCIR is examining various technical parameters for digital land mobile voice and data communication.[15] Also, at some time in the near future, the private land mobile user community could adopt digital and begin development of digital standards.

Question 20:

a. Given that public safety systems closely resemble other private land mobile systems, should the public safety community consider adoption of the same (or similar) standards that may be developed by these other land mobile user groups?

b. To what extent should standards for the public safety community be identical to or compatible with standards used by the federal government?

Question 21:

Should (or will) the public safety community wait until standards are adopted and implemented successfully by other groups before considering their use for the public safety services?

FCC Role

18. In its Report and Order in Gen. Docket No. 87-390, released December 12, 1988,[16] the Commission modified its regulations governing cellular operations to permit the cellular industry to develop digital or other advanced

technologies. The cellular industry is now determining the standards that will be used in their digital system. The Commission could adopt a similar approach for the public safety services. The following questions explore the various options that the Commission may take in its potential involvement with the development of digital for public safety.

Question 22:

a. Is there sufficient justification, from a technical, economic or operational point of view, for the Commission to mandate the use of digital technology by the public safety community?

b. Should the Commission leave it entirely to the public safety users and industry to determine if, when, and how they should develop a digital capability? Would a digital public safety capability be likely to be developed under these circumstances?

c. Should the Commission undertake a cellular-type rule making[17] for the public safety services to encourage digital operation on public safety spectrum?

d. Should the Commission set aside a certain amount of existing public safety spectrum for exclusive digital operation?

Question 23:

a. If standards are to be developed for public safety communications, in what forum should this activity occur?

b. Should the Commission establish a government-industry advisory committee to develop standards?

c. The government-industry advisory group for HDTV will likely take three to five years to develop a standard for advanced television. How long would it take for a similar committee to establish digital standards for public safety? Would the time required to develop standards excessively delay the implementation of digital technology for public safety?

d. Should the Commission look to an industry group such as EIA to develop standards?

Question 24:

If the public safety community decides to convert to digital, what measures, if any, should be taken by the Commission to ensure that the needs of all public safety users are met during the transition period? (*E.g.*, should the Commission require manufacturers to offer a "dual-mode" capability on all public safety equipment during that time period?)

Question 25:

If standards are developed, should they be treated as voluntary industry standards or should the Commission mandate their use through rule making?

V. SUMMARY

19. We invite all interested parties to comment on these issues relating to advanced technologies in the public safety radio services. We specifically encourage entities involved in manufacturing and those involved in the use of public safety radio equipment to submit comments on these questions.

20. Accordingly, we adopt this *Further Notice of Inquiry* under the authority contained in Sections 4(i) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 403. Pursuant to the procedures set out in Section 1.415 of our Rules, 47 C.F.R. § 1.415, interested persons may file comments on or before **March 16, 1990** and may file reply comments on or before **April 13, 1990**. We will consider all relevant and timely comments before taking final action in this proceeding. In reaching its decision, the Commission may consider information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file and the fact of our reliance on such information is noted in any subsequent actions.

21. In accordance with the provisions of Section 1.419 of the Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Persons who wish to participate informally may do so by submitting one copy. All comments will be given the same consideration regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Gen. Docket No. 88-441, 3 FCC Rcd 5399 (1988).

[2] Memorandum Opinion and Order in Gen. Docket No. 88-441, 4 FCC 3874 (1989).

[3] *See* Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, Section 9(a), 97 Stat. 1467 (1983).

[4] Report and Order in Gen. Docket Nos. 84-1231, 84-1233, 84-1234, 2 FCC Rcd 1825 (1986).

[5] Report and Order in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987).

[6] *See* Memorandum Opinion and Order on Reconsideration in Gen. Docket No. 87-112, 3 FCC Rcd 5391 (1988), Notice of Inquiry in Gen. Docket No. 88-441, 3 FCC Rcd 5399 (1988), Memorandum Opinion and Order in Gen. Docket No. 88-441, 4 FCC Rcd 3874 (1989).

[7] These are Frequency Division Multiple Access (FDMA), Time Division Multiple Access (TDMA), and Code Division Multiple Access (CDMA). FDMA enables users to gain access and exclusive use of any of several available narrowband channels. TDMA allows channels to be divided into time slots, enabling several users to access and share the channels at the same time. CDMA is the implementation of the wideband spread spectrum technique which permits each mobile unit to be identified by a unique code, allowing simultaneous transmission by many users.

[8] We encourage the manufacturing community, in this inquiry, to provide information on the radio technologies they are working on and their timetables for marketing those technologies. We are sensitive to the competitive nature of such information and, in order to encourage its submission, would look favorably on requests for confidential treatment under Sections 0.457 and 0.459 of our rules, 47 C.F.R. §§ 0.457 and 0.459.

[9] Such as narrow band FM (NBFM) and amplitude compandered single sideband (ACSB).

[10] Digital encryption is currently accomplished by converting the analog signal to digital, encrypting the digital signal, and reconverting the encrypted digital signal back to analog prior to transmission.

[11] George Calhoun, *Digital Cellular Radio*, Artech House, Norwood, Massachusetts, 1988 at 431-432.

[12] For example, could digital radios be designed to transmit and receive different bit rates, voice coding and modulation schemes, etc., and if so, would this obviate the need for a *single* set of digital standards?

[13] Cellular standards are presently being developed by EIA Subcommittee TR 45.3.

[14] This work is being done by the Federal Telecommunications Standards Committee Land Mobile Radio Subcommittee.

[15] This work is being done by the Ad Hoc Study Group 8A (Land Mobile Services) of CCIR Study Group 8 (Mobile Services).

[16] *See* Report and Order, Gen. Docket No. 87-390, 3 FCC Rcd 7033 (1988).

[17] *See* note 16, *infra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 8, 1989

TREATMENT OF *EX PARTE* CONTACTS IN PROCEEDINGS CONCERNING SHARED NETWORK FACILITIES AGREEMENTS FOURTH SUPPLEMENTAL SERVICE LIST

Pursuant to Public Notice, DA 89-829 (released July 14, 1989), all of the various formal and informal complaints and tariff investigations involving shared network facilities agreements (SNFAs) were designated as restricted proceedings for purposes of Commission Rules governing ex *parte* contacts. As stated in the Notice, any written presentations in CC Docket No. 85-166, Phase I, tariff investigation, the formal complaints listed in Appendix A of the Notice, or the informal complaints listed in Appendix B of the Notice must be served on all parties of record in CC Docket No. 85-166 and all parties to any formal complaints and informal complaints listed in Appendix C of the Notice. The Notice further provided that service would be required on all parties to any substantively related complaints filed in the future. Consistent with the July 14 Notice, public notices supplementing the original service list were released on August 21, 1989, September 25, 1989, and October 31, 1989. *See* Public Notice, DA 89-964 (released August 21, 1989); Public Notice, DA 89-1137 (released September 25, 1989); Public Notice, DA 89-1374 (released October 31, 1989).

In accordance with the July 14 Notice, we hereby further amend the service list contained in Appendix C of that Notice to include the following parties:

Richard J. Heitmann, Esquire
John A. Ligon, Esquire
One Harmon Plaza
Secaucus, New Jersey 07096-1516
(Metromedia Long Distance, Inc.;
Communication Services, Inc.)

As stated in the July 14 Notice, this action is taken pursuant to Section 1.1200(a) of the Commission's Rules, 47 C.F.R. § 1.1200(a), which permits the Commission, in its discretion, to adopt modified or more stringent *ex parte* procedures in particular proceedings if the public interest so requires.

For further information, contact Thomas J. Beers or Kurt A. Schroeder at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 1, 1989

Released: December 8, 1989

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Gentlemen:

As you know, there are applications pending by which Newtel, Inc., seeks the Commission's consent to acquire control of TVX Broadcast Group, Inc. (TVX), licensee of several television broadcast stations.[1] As currently proposed, Paramount Communications, Inc. (Paramount), will control Newtel, Inc. Those applications cannot be acted upon at this time for reasons unrelated to this ruling. As a preliminary step, however, Paramount now seeks to acquire a noncontrolling, attributable interest in TVX.[2] As will be noted below, Paramount's purchase of an attributable interest now and its plan to acquire control of TVX raise possible conflicts with the multiple- and cross-ownership rules. [3] Those potential conflicts are the subject of this letter.

The following information will aid in understanding this case. In our *Attribution* decisions,[4] we identified those positional and ownership interests that are cognizable under the ownership rules. In the case of corporate licensees, all officers, directors and holders of five percent or more of the voting stock (ten percent, in the case of certain passive investors) are considered to have attributable interests that trigger the applicability of the ownership rules. Further, we modified another policy in *Attribution* that is relevant here:

> [W]e have previously determined that the interests held by one spouse are to be presumptively attributed to the other. Notwithstanding the nearly conclusive stature the Commission has accorded this presumption in the past, we will henceforth permit this presumption to be rebutted on a case-by-case basis, in appropriate circumstances.[5]

Mr. Ronald L. Nelson is the Senior Vice-President and Chief Financial Officer of Paramount. His wife, Joyce M. Fields, is the Treasurer of The Times Mirror Company (Times Mirror). If the media interests held by those companies are jointly attributed to Ms. Fields and Mr. Nelson, based on the presumption of spousal attribution, the following conflicts with the ownership rules would result, if Paramount acquires an attributable interest in TVX.

1. Times Mirror is the licensee of station KDFW-TV (channel 4, CBS), Dallas, Texas, and TVX is the licensee of station KTXA(TV) (channel 21, Ind.), Arlington, Texas. The Grade B contour of station KDFW-TV encompasses the Grade B contour of Station KTXA(TV). Holding attributable interests in two television stations that serve areas in common violates section 73.3555(a) of the Rules.

2. Similarly, the Grade B contour of TVX's station KRRT(TV), (channel 35, Ind.) Kerrville, Texas, overlaps the Grade B contour of Times Mirror's station KTBC-TV, Austin, Texas (channel 7, CBS). The overlap area encompasses about 17.5 percent of the area and 8.6 percent of the population within the Grade B contour of station KRRT(TV) and about 11.3 percent of the area and 10.2 percent of the population within the Grade B contour of station KTBC-TV.

3. Times Mirror operates a cable television system in Kerrville, Texas, and TVX, as noted, controls station KRRT(TV) located in that city. Holding attributable interests in a television station and a cable television system within that station's Grade B contour violates section 76.501 of the Rules and section 613 of the Communications Act.

4. TVX's station WTXF-TV, Philadelphia, places a Grade A contour beyond Allentown, Pennsylvania. Times-Mirror publishes *The Morning Call*, a daily newspaper, in Allentown. Section 73.3555(c) of the Rules prohibits holding attributable interests in a television station and a daily newspaper that is published within the Grade A contour of the station.

PLEADINGS

Recognizing these difficulties, you have submitted a showing to rebut the presumption of spousal attribution, based on the circumstances of this case. You note that neither Mr. Nelson nor Ms. Fields has an attributable ownership interest in either company, neither is a director of either company and neither has day-to-day management or operating responsibilities with respect to the media activities of their respective employers. Further, you argue that because Mr. Nelson and Ms. Fields are "finance specialists in the corporate offices of large holding companies . . . with numerous and diverse lines of business, the requisite degree of insulation from FCC-licensed facilities is already firmly in place." In this regard, you contend that the Commission has granted relief from spousal attribution even where the spouses involved bore daily operating responsibilities at competing facilities. You also assert that neither spouse here is the alter ego of the other, that both have pursued entirely independent careers and that they have risen to their present positions based on their abilities and performance. Additionally, you state that Ms. Fields and Mr. Nelson, based on their professional obligations, do not discuss business matters concerning their respective companies with each other and that neither is privy to nonpublic financial information about the other's company. Moreover, you argue that the proposed transfer of TVX cannot be reason-

ably viewed as arising out of a motive to evade the Commission's ownership rules. Rather, you believe that the conflicts posed by spousal attribution in this case are clearly the unintended and incidental by-product of a large, widely held company's decision to diversify its business. Finally, you contend that the abundance of broadcast and other media in the areas where the potential violations of the ownership rules would occur militates against any potential for harm to economic competition in those markets. In this connection, you note that Dallas-Ft. Worth is served by eleven commercial television stations and more than thirty radio stations, while the Kerrville-San Antonio market is served by six commercial television stations, two noncommercial television stations and thirty radio stations.

Warner Communications, Inc. (Warner), in a motion filed in a separate proceeding, challenged the applicants' request in this proceeding for exemption from spousal attribution.[6] First, Warner contended that the fact that neither Mr. Nelson nor Ms. Fields has an attributable stock ownership interest in either Paramount or Times-Mirror is unavailing as a basis for exemption since the corporate officerships held by these individuals affords each of them a powerful interest which the Commission has explicitly determined should be attributable. For similar reasons, Warner also argued that Ms. Fields's and Mr. Nelson's asserted lack of any day-to-day management responsibilities at the relevant stations and cable system does not justify the requested exemption. Warner notes in this regard that the Commission exempts corporate officers of multifaceted parent corporations from attribution only where their duties and responsibilities are wholly unrelated to the broadcast or cable subsidiary and this fact is properly documented. Warner further observed that the discharge of duties related to financial matters -- the area in which both Mr. Nelson and Ms. Field exercise authority -- is one principal indicator used by the Commission in evaluating an individual's influence over a licensee's affairs.

Warner next challenged Paramount's assertion that Ms. Fields and Mr. Nelson have had independent careers and that they make it a practice not to discuss business matters concerning their respective companies. These broad, undocumented statements,[7] Warner argued, are inadequate to support nonattribution, particularly in light of the detailed standards governing nonattribution of spousal interests in a comparative licensing context announced in a recent Review Board decision. *Richard P. Bott, II*, 4 F.C.C. Rcd. 4924 (Rev. Bd. 1989) (review pending). Warner described the five-part test specified by the Board in *Bott*, as follows: (i) that the spouse seeking to avoid attribution of the other's media interests demonstrate no prior interest or involvement by the other spouse in those media properties; (ii) a history of individual and separate business interests; (iii) the applicant-spouse is the sole financial force behind the application; (iv) the nonapplicant spouse has not participated in the application and will not participate in the station's affairs; and (v) the nonapplicant spouse holds no current equity interest in the applicant entity. *Id.* at 4927. Warner argued that Paramount has failed to satisfy these criteria, noting, for example, that Paramount has not demonstrated a history of separate business interests and that both Mr. Nelson and Ms. Fields hold equity interests in their respective companies, although not so large as to be attributable.

Finally, Warner dismissed as inapposite Paramount's assertion that an abundance of media exists in the areas where potential ownership conflicts would be produced. Warner argues that Paramount seeks nonattribution of the interests involved and that this is solely a function of the relationship, positions and actions of Mr. Nelson and Ms. Fields, not the environment of the media interests which are sought to be attributed.

Time, Inc. (Time), also opposed Paramount's request for exemption from spousal attribution.[8] Time asserted that it is well established that waiver of, or exemption from, the spousal attribution presumption is strictly limited to unique circumstances that do not undermine the dual diversity and competition goals of the Commission's ownership rules. In assessing whether particular cases conform to this broad requirement, Time stated that the Commission looked to specific characteristics as decisionally significant, including whether the request for exemption or waiver arises as a result of the acquisition of a license and whether grant of the request would open a floodgate of other similar requests. Time contended that, unlike all prior waivers, Paramount's case does involve the acquisition of license and, because it affects large markets, could open a floodgate of similar requests for exemption. Time asserts that Paramount has provided "absolutely no public policy grounds for departing from Commission precedent . . ." and concludes that exemption or waiver of spousal attribution in this proceeding is unwarranted.

In response, Paramount turns first to the test set forth in *Richard P. Bott, II*, above. Paramount asserts that Mr. Nelson and Ms. Fields fully comply with the criteria established in that case. Specifically, Paramount states: (i) Ms. Fields could not have had a prior interest in any Paramount media properties since these properties will not exist until exercise of Paramount's option; (ii) Mr. Nelson's separate career and business interests have already been documented; (iii) neither Ms. Fields nor Times Mirror is providing funding; (iv) Warner does not and could not claim that either Ms. Fields or Times Mirror participated in Paramount's applications or will participate in its future licensed facilities; and (v) Ms. Fields has no equity interest in Paramount and Mr. Nelson's nonattributable ownership interest in that company is not jointly held.

Paramount also disputes Warner's apparent contention that Ms. Fields' and Mr. Nelson's positions as financial officers of parent corporations render them ineligible for exemption from spousal attribution because control over station finances is a key determinant of influence over station affairs. Paramount points out that Mr. Nelson and Ms. Fields do not and will not control finances at the station level. Rather, their financial duties are at the corporate level of "large, publicly held companies with substantial non-FCC-licensed lines of business." Paramount further notes that in those cases where the Commission has assertedly granted exemption from spousal attribution, the ability of the parties involved to affect directly viewpoint diversity and economic competition was vastly greater than it is here. In *Lady Sarah McKinney - Smith*, 59 F.C.C.2d 389 (1976) ("*McKinney - Smith* "), for example, the parties were the sole owner-managers of radio stations only twenty miles apart. Finally, Paramount argues that the abundance of other media in the area where the potential cross-ownership

violation would occur has always been considered by the Commission a relevant and important factor in evaluating spousal attribution.

DISCUSSION

The Commission presumptively attributes the interests of one spouse to the other on the grounds that there is "a very close relationship and community of interest between husband and wife." *Richard R. Zaragoza*, 2 F.C.C. Rcd. 5078, 5078 (MMB 1987) (" *Zaragoza* "). This is the first case in which the Commission itself has been called upon to address the question of spousal attribution since it determined in *Attribution* that the presumption might be rebutted in appropriate circumstances. In that connection, it should be observed that cases such as *McKinney - Smith* and *Zaragoza*, above, were not resolved on the basis that spousal attribution had been rebutted. Instead, the starting point of the analysis in those cases was that the media interests of one spouse should be attributed to the other. The cases held, however, that waivers of the ownership rules were warranted in the circumstances presented. The Review Board's decision in *Bott* is the only case that deals directly with the question of whether an applicant had rebutted the presumption of spousal attribution, and concluded that the applicant had not made a sufficient showing based on the facts presented there.

In the absence of a Commission ruling in this area, we believe it appropriate to consider the nature of the showing needed to rebut the presumption of spousal attribution. We believe that case-by-case rulings are required. Although we do not necessarily endorse the factors listed by the Board in *Bott*, 4 F.C.C. Rcd. at 4927, they may be helpful in some cases. Nonetheless, whatever factors may be relevant must be viewed in light of the goals underlying the ownership rules, which are the preservation of economic competition and diversity of programming viewpoints. The degree to which those goals may be aided or hindered must be the primary consideration. We also note that we have generally attempted to adopt attribution standards in which the structure of the relationship, in contrast to stated intentions of the parties involved, serves the goals of the rules. *See, e.g., Twentieth Holdings Corp.*, 4 F.C.C. Rcd. 4052, 4054 (1989), and *Macfadden Acquisition Corp.*, 104 F.C.C.2d 545, 564 (1986). Because of the nature of the spousal relationship, a "structure" that is not fully consistent with the concept of arm's-length competition, we believe that a high standard of review should be applied to those seeking to rebut the presumption of spousal attribution.

Turning to the pleadings filed in this case, we believe that Warner is correct in asserting that the nature of media competition in a particular market is not relevant to our determination as to spousal attribution.[9] We have determined in *Attribution*, 97 F.C.C.2d at 1024-25, that corporate officers should be considered as having cognizable interests for the purpose of administering the ownership rules. We have never suggested that it would be permissible for a person to be an officer of two licensees that compete in large markets with numerous media outlets, but impermissible if the corporations compete in a small market with a few such outlets. The question is properly the relationship between the spouses, and between the spouses and their respective employers, not the number of media outlets in the markets in which their employers compete.

We also agree with Warner that senior financial officers hold influential positions within corporations. Further, as noted by Warner, when officers seek "attribution relief for corporate officers . . . of multifaceted parent corporations," that relief will be granted where those "individuals' duties and responsibilities are neither directly nor indirectly related to the activities of any broadcast licensee in which their corporation has a cognizable interest." *Attribution*, 97 F.C.C.2d at 1025. We believe that Warner's observations are not dispositive in the context of this case. Mr. Nelson and Ms. Fields are not seeking to insulate themselves from their respective employers, but rather the barrier they seek to establish is between one spouse and the interests of the other spouse's employer.[10] Thus, the fact that the two individuals here hold important positions with their employers and that they are at least indirectly involved with broadcast, cable or newspaper operations is not determinative.

Cases such as *McKinney - Smith* and *Zaragoza*, as noted by Time, did not involve the purchase of a station.[11] Paramount's ultimate plan is to acquire control of the TVX stations. The fact that a purchase of a station may be involved may be very relevant in some cases. For example, if one spouse buys a station with funds provided by the other spouse, particularly if the buyer lacks broadcast experience, rebutting the presumption of spousal attribution would be exceedingly difficult. We do not accept Time's apparent suggestion, however, that all cases involving acquisitions are irrebuttably presumed to require spousal attribution. Again, we believe it is more fruitful to review the business relationship between the spouses, and between the spouses and their respective employers. The context from which the conflict with the ownership rules arises may be relevant, but is not by itself determinative. Accordingly, the matters raised by Time and Warner do not compel a finding that the positional interests held by Ms. Fields and Mr. Nelson should be attributed to one another.

We have carefully reviewed the facts of this case, the pleadings and the representations made to us. We believe that the applicants have met the high standard of review and that they have rebutted the presumption of spousal attribution in this case for the following reasons. First, the positional interests held here are not in companies whose sole activity is broadcasting, cable television or newspaper publishing. Paramount and Times Mirror are large, multifaceted companies with diverse business interests. The facilities that create the potential problems are a small part of the total assets of each company. Thus, Ms. Fields and Mr. Nelson do not focus their attention exclusively on activities subject to our regulation. Second, the interests held are positional only. Ms. Fields and Mr. Nelson have represented that existing and future ownership interests, including noncognizable ownership interests, are held in their individual names. There are no cognizable ownership interests involved that would carry with them the expectation of succession of ownership by the other spouse. Third, Mr. Nelson and Ms. Fields have followed their separate careers for more than ten years, and reached their present positions by reason of their individual abilities and efforts. This case does not arise because one spouse has decided to buy a station, or to fund the purchase by the other spouse. Instead, the conflict arises as incidental to Paramount's decision to ac-

quire TVX. There is nothing in the record to suggest that the purchase was motivated by an intent to avoid the applicability of the ownership rules.

Fourth, Ms. Fields and Mr. Nelson have submitted a declaration in which they represent several relevant matters, including the following:

> a. Neither spouse will provide the other with business or other records pertaining to any Commission-regulated activity.
>
> b. Neither spouse will act as an employee or agent, provide services, or be directly or indirectly involved in the management or operation of the other spouse's company (or any subsidiary or affiliate of that company) as to any Commission-regulated activity.
>
> c. Neither spouse will provide or receive financial assistance from the other's company or its subsidiaries or affiliates.
>
> d. Neither spouse will facilitate the exchange of personnel, equipment or information with respect to Commission-regulated activities of their employers, or their subsidiaries or affiliates.
>
> e. The spouses will not communicate with each other with respect to the day-to-day operations or the longer term planning of Commission-regulated activities of their employers, their subsidiaries or affiliates.

We believe that based on the above facts and representations, there will be no cognizable diminution of economic competition or diversity of programming viewpoints among the various media interests listed at the outset. Although the spouses hold attributable interests in their employers' media businesses, as a matter of degree, those interests are not so direct as to require imputing them to one another. We conclude that the high burden of review has been met and that the applicants have rebutted the presumption of spousal attribution. We stress that our conclusion is based on the cumulative consideration of all the facts and representations before us, not upon any individual factor. In dealing with any future requests, modest changes in the facts may result in a different conclusion.[12]

Accordingly, Paramount is free to acquire its proposed noncontrolling, attributable interest in TVX. Further, absent changed circumstances, this question need not be revisited at a later date in connection with the processing of the pending transfer applications. This decision is effective on the date of adoption.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The stations involved are: WLFL-TV, Raleigh, North Carolina; WTFX-TV, Philadelphia, Pennsylvania; WNOL-TV, New Orleans, Louisiana (application to assign this license to a third party is pending); KTXH(TV), Houston, Texas; WDCA-TV, Washington, D.C.; KTXA(TV), Arlington, Texas; and KRRT(TV), Kerrville, Texas. All these stations operate in the UHF band, and none are affiliated with a major television network.

[2] Paramount proposes to acquire 22 percent of TVX's voting common stock and all of TVX's convertible preferred voting stock. The latter elects a minority of the TVX Board of Directors.

[3] 47 C.F.R. §§ 73.3555 and 76.501 (collectively, the "ownership rules").

[4] *Attribution of Ownership Interests*, 97 F.C.C.2d 997 (1984), *reconsidered in part*, 58 R.R.2d 604 (1985), *further reconsidered*, 1 F.C.C. Rcd. 802 (1986) (" *Attribution* ").

[5] *Attribution*, 58 R.R.2d at 620.

[6] Although Warner subsequently withdrew its pleading, we believe that consideration of its allegations will be helpful in resolving this case.

[7] Paramount later filed a declaration from Mr. Nelson and Ms. Fields setting out with particularity their representations on this subject. Their declaration will be described below.

[8] Like Warner, Time also withdrew its pleading. Again, however, its allegations are helpful in resolving this case and will be considered.

[9] The nature of the market will continue to be relevant in those cases where parties seek waivers of the multiple-ownership rule. *See, e.g., Amendment of Section 73. 3555*, 4 F.C.C. Rcd. 1741, 1753 (1989).

[10] So there is no misunderstanding on this point, Mr. Nelson will continue to have attributable interests in the media activities controlled by TVX, and Ms. Fields will similarly have attributable interests in the media activities controlled by Times Mirror.

[11] In *Zaragoza*, for example, a wife was an employee at one station. Her employer wished to promote her to a position as an officer of the licensee, which is an attributable interest. The relevant contours of the station overlapped contours of other stations in which her husband held attributable, but noncontrolling interests. 2 F.C.C. Rcd. at 5078.

[12] Given the narrowness of our determination, we do not share Time's concern that this decision will result in a floodgate of similar requests.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-564

In the Matter of

Amendment of Section 73.202(b), RM-7016
Table of Allotments,
FM Broadcast Stations.
(Forrest City, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1989; Released: December 12, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Forrest City Broadcasting Company (petitioner), licensee of Station KBFC(FM), Channel 228A, Forrest City, Arkansas, seeking the substitution of Channel 228C3 for Channel 228A and modification of its license to specify the higher power channel. Petitioner states its intention to apply for Channel 228C3 if allotted to Forrest City.

2. A staff engineering analysis of the proposal reveals that Channel 228C3 can be allotted to Forrest City at the petitioner's suggested site 19.1 kilometers (11.9 miles) southwest[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 228C3 for Channel 228A at Forrest City, Arkansas. As requested, we also propose to modify the Class A license of Station KBFC(FM) to specify operation on Channel 228C3. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 228C3 at Forrest City.

4. Accordingly, in order to provide Forrest City with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Forrest City, Arkansas	228A	228C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 2, 1990,** and reply comments on or before **February 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Eugene T. Smith, Esq.
715 G Street, S.E.
Washington, DC 20003

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Reference coordinates at the petitioner's suggested site for Channel 228C3 at Forrest City are 34-52-36 and 90-55-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-565

In the Matter of

Amendment of Section 73.202(b), RM-6950
Table of Allotments,
FM Broadcast Stations.
(Tahoe City, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1989; Released: December 12, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Mid-South Broadcasting Company (petitioner), licensee of Station KRZQ-FM, Channel 243C2, Tahoe City, California, seeking the substitution of Channel 243C1 for Channel 243C2 and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 243C1 can be allotted to Tahoe City at the petitioner's suggested site 39.5 kilometers (24.6 miles) east[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 243C1 for Channel 243C2 at Tahoe City, California. As requested, we also propose to modify the license of Station KRZQ-FM to specify operation on Channel 243C1 in lieu of Channel 243C2. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 243C1 at Tahoe City.

4. Accordingly, in order to provide Tahoe City with an expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Tahoe City, California	243C2	243C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 2, 1990,** and reply comments on or before **February 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William R. Richardson, Jr., Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates at the petitioner's specified site for Channel 243C1 at Tahoe City are 39-16-22 and 119-42-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-566

In the Matter of

Amendment of Section 73.202(b), RM-7013
Table of Allotments,
FM Broadcast Stations.
(Good Hope, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1989; Released: December 12, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Community Broadcasting Company, Inc. (petitioner), requesting the allotment of Channel 222A to Good Hope, Georgia, as the community's first local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 222A can be allotted to Good Hope in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3 miles) east[1] in order to avoid a short spacing to Station WDEF(FM), Channel 222C at Chattanooga, Tennessee.

3. In view of the fact that Good Hope, Georgia, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Good Hope, Georgia	--	222A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 2, 1990,** and reply comments on or before **February 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Samuel Miller
Miller & Fields, P.C.
P. O. Box 33003
Washington, D.C. 20033
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment, which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 33-45-54 and 83-33-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Pinewood, South Carolina)

MEMORANDUM OPINION AND ORDER

Adopted: November 28, 1989; Released: December 12, 1989

By the Acting Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by Pinewood Broadcasting Partnership directed to the staff letter of May 3, 1989, dismissing its petition for rule making proposing the allotment of Channel 238A to Pinewood, South Carolina. Millennium Communications of Charleston, Inc., filed an opposition to the petition for reconsideration, and Pinewood Broadcasting Partnership filed a reply to the opposition. For the reasons discussed below, we are denying the petition for reconsideration.

BACKGROUND

2. In order to put this matter in perspective, it is first necessary to discuss the related matter in MM Docket No. 88-145. On March 21, 1988, we adopted a *Notice of Proposed Rule Making* in MM Docket No. 88-145, proposing the substitution of Channel 227C2 for Channel 228A at Summerville, South Carolina, and modification of the license of Station WWWZ-FM, Channel 228A, Summerville, South Carolina, to specify operation on Channel 227C2. *See* 3 FCC Rcd 2189 (1988). In response to the *Notice*, we received a timely counterproposal on June 6, 1988, from Savannah Radio Partnership proposing the allotment of Channel 227A to Summerton, South Carolina, as a first local FM service. Subsequently, on October 12, 1988, Millennium Communications of Charleston, Inc. ("Millennium"), licensee of Station WWWZ-FM and proponent for the Channel 227C2 upgrade at Summerville, filed a "Motion for Leave to File Supplemental Comments." In that Motion, Millennium notes that due to a staff action returning a petition for rule making proposing a Channel 257C2 upgrade at Chester, South Carolina, and an attendant Channel 238A for Channel 257A substitution at Wedgefield, South Carolina, Channel 238A has become available as an alternate channel for Summerton. Thereafter, on January 17, 1989, Pinewood Broadcasting Partnership ("PBP") filed its petition for rule making proposing the allotment of Channel 238A to Pinewood, South Carolina. On May 3, 1989, this rule making petition was dismissed due to a conflict with a possible Channel 238A allotment at Summerton.

3. In its petition for reconsideration, PBP contends that dismissal of its petition for rule making constituted error because a proposed use of Channel 238A at Summerton was an untimely counterproposal in MM Docket No. 88-145, and, therefore, not entitled to consideration. PBP contends that there was no basis to dismiss its Channel 238A rule making petition for Pinewood. PBP also argues that it was not afforded the requisite notice that its Channel 238A proposal for Pinewood could be precluded by a Channel 238A allotment at Summerton. In the event that the Commission will consider Millennium's "untimely filed counterproposal," PBP requests that the Commission also consider its petition for rule making in conjunction with that counterproposal.

DISCUSSION

4. We deny the petition for reconsideration. In the present situation, PBP was afforded the requisite notice that the Summerton Channel 227A counterproposal in MM Docket No. 88-145 could preclude its subsequent petition for rule making proposing Channel 238A at Pinewood, South Carolina. Section 553 of the Administrative Procedure Act requires that a rule making proceeding provide adequate notice and a fair opportunity for interested parties to participate and present relevant information. In MM Docket No. 88-145, the *Notice* proposed a Channel 227C2 upgrade at Summerville, South Carolina, and invited the filing of comments no later than June 6, 1988.[1] In response to the *Notice*, Savannah Radio Partnership submitted a timely counterproposal proposing a Channel 227A allotment at Summerton, South Carolina. Public notice of that counterproposal was given on June 15, 1988 (Report No. 1734). At that juncture, our standard procedure is to search for alternate channels for both communities. The effect of a successful channel search is to preclude subsequent proposals that conflict with alternate channels if those subsequent proposals were not filed by the comment date in the original rule making proceeding. Because a notice of proposed rule making in a channel allotment proceeding specifically elicits counterproposals, both the actual counterproposal advanced by the proponent and any alternate channel for either the counterproposal or the original proposal are within the scope of the notice. *See Owensboro on the Air v. United States*, 262 F.2d 702 (D.C. Cir. 1958).[2] This procedure complies with the "logical outgrowth" test applied by the Court of Appeals to determine whether a rule making action was based on adequate notice and opportunity for public participation. *See Weyerhaeuser Company v. Costle*, 590 F.2d 1011,1031 (D.C. Cir. 1978); *Owensboro on the Air v. United States*, *supra*. In addition to being unnecessary to provide the further notice, a procedure of announcing precisely what alternate channels may be considered in a rule making proceeding is both burdensome and not conducive to the efficient transaction of Commission business.[3]

5. For these reasons, the petition for rule making proposing Channel 238A at Pinewood, South Carolina, was untimely with respect to the cut-off date established in the *Notice of Proposed Rule Making* in MM Docket No. 88-145, and was properly dismissed. In regard to the related matter in MM Docket No. 88-145, since we have ascertained the availability of the alternate channel, there is no reason to accept any supplemental comments by Millennium. Accordingly, the "Motion for Leave to File Supplemental Comments" filed by Millennium will be denied in MM Docket No. 88-145.

6. Accordingly, IT IS ORDERED, That the aforementioned petition for reconsideration filed by Pinewood Broadcasting Partnership IS HEREBY DENIED.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas Webbink
Acting Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Section 1.420(d) of the Commission's Rules requires that counterproposals be advanced by the comment date.

[2] In addition, paragraph 3(c) of the Appendix to a notice of proposed rule making in an allotment proceeding specifically alerts interested parties that a filing of a counterproposal may lead the Commission to allot a different channel than that which was originally proposed.

[3] Contrary to Pinewood Broadcasting Partnership's contention, our decision to return its petition for rule making for Channel 238A at Pinewood was not a result of acceptance of a late-filed pleading in MM Docket No. 88-145 suggesting Channel 238A for Summerton. Channel 238A at Summerton had already been entered into the FM data base on July 15, 1988, as an alternate channel, prior to the October 12, 1988, submission by Millennium suggesting Channel 238A. The fact that an alternate channel was suggested in a late-filed pleading does not preclude us from ascertaining the availability of this channel on the basis of our own channel study, either before or after the late-filed pleading.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-568

In the Matter of

Amendment of Section 73.202(b), RM-7024
Table of Allotments,
FM Broadcast Stations.
(Clifton, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1989; Released: December 12, 1989

By the Chief, Allocations Branch:

1. At the request of Bosque Broadcasting Corp. (petitioner), the permittee of Station KWOW(FM), Channel 277A at Clifton, Texas, the Commission considers herein a petition for rule making seeking the substitution of Channel 277C3 for Channel 277A at Clifton. Petitioner also seeks the modification of its construction permit for Station KWOW(FM) to specify operation on the higher class channel. Petitioner submits information in support of its proposal.

2. The channel substitution can be accomplished consistent with the Commission's minimum distance separation requirements at the site specified by the petitioner.[1] Therefore, as requested we shall propose to modify the permit of Station KWOW(FM) to specify operation on the higher class co-channel, Channel 277C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Clifton.

3. In view of the fact that Clifton, Texas, could receive its first wide coverage area FM station, we believe it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Clifton, Texas	277A	277C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 2, 1990,** and reply comments on or before **February 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Arthur Blooston, Esquire
Caressa L. Davison, Esquire
Blooston, Mordkofsky
Jackson and Dickens
2120 L Street, N.W.
Washington, D. C. 20037
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Petitioner specified a site located 12.7 kilometers (7.9 miles) east of Clifton, Texas, at coordinates 31-47-30 and 97-26-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-567

In the Matter of

Amendment of Section 73.202(b), RM-7028
Table of Allotments,
FM Broadcast Stations.
(Electra, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1989; Released: December 12, 1989

By the Chief, Allocations Branch:

1. At the request of Albert L. Crain (petitioner), permittee of Station KWTA(FM), Channel 236A, Electra, Texas, the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 235C2 for Channel 236A at Electra. Petitioner also requests the modification of his construction permit for Station KWTA(FM) at Electra to specify operation on the higher powered channel. Petitioner states an intention to apply for the channel, if allotted.

2. Channel 235C2 can be allotted to Electra in compliance with the Commission's minimum distance separation requirements at the petitioner's specified site, located 8.3 kilometers (5.2 miles) northwest of the city.[1] As requested, we shall propose to modify the construction permit for Station KWTA(FM) to specify operation on Channel 235C2 in lieu of Channel 236A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Electra.

3. In view of the fact that Electra, Texas, and the surrounding area could receive a wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Electra, Texas	236A	235C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 2, 1990,** and reply comments on or before **February 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Albert L. Crain
Route 5, Box 755-1
Byhalia, MS 38611

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

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(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 34-06-03 and 98-57-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southern New England
Telephone Company

Petition for Review
of Accounting Orders
Imposed in Tariff
Investigations

American Telephone
and Telegraph Company

Charges for
Interstate Telephone
Service — **DOCKET NO. 19129**

Revisions of the
Wide Area
Telecommunications
Service (WATS)
Tariff F.C.C. No. 259 — **DOCKET NO. 19989 and CC DOCKET NO. 80-765, Phase I**

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1989; Released: December 13, 1989

By the Commission:

I. INTRODUCTION

1. This is the fourth in a series of Orders addressing a petition filed by the Southern New England Telephone Company (SNET). In the petition, filed on August 14, 1987, SNET requests that this Commission review 15 outstanding accounting orders for the purpose of determining whether they should be terminated. These orders are listed in the Appendix to this Order. Twelve of the accounting orders have been terminated in three previous Commission Orders.[1] This fourth, and final, Order in this series terminates the three remaining open accounting orders described in the SNET petition. These accounting orders were entered during this Commission's investigation of AT&T's tariffs for Wide Area Telecommunications Service (WATS).

II. BACKGROUND

2. On August 26, 1987, this Commission released a Public Notice inviting comments on SNET's petition.[2] Comments were filed on February 16, 1988, and replies were filed on April 4, 1988.[3] While all the commenters agree with SNET that the accounting orders should be terminated, MCI contends that this Commission should examine the underlying investigations before terminating a proceeding. In the *ENFIA Order*, the first Order in this series, we concluded that we should follow that procedure. The *ENFIA Order* terminated the investigations as well as the accounting orders that were entered in these dockets. In addition, the Order summarizes the petition and the comments.[4] Finally, due to the number and complexity of the accounting orders under review, this Commission determined in the *ENFIA Order* that the optimum method of examining each investigation and accounting order would be to group the accounting orders according to service category, as AT&T does in its comments, and to issue a separate Order for each group.[5]

III. THE ACCOUNTING ORDERS

3. This Order examines the fourth category of investigations and of accounting orders which are associated with AT&T's WATS and 800 Service tariffs filed during the 1970s and 1980s. The first of those accounting orders was imposed in Docket No. 19129, in which this Commission investigated a tariff filing that increased rates for MTS and WATS. The increases, which were interim in nature, were filed pursuant to our Order in Phase I of that investigation.[6]

4. In 1974, this Commission initiated another major investigation of AT&T's WATS rate structure and overall rate of return. That proceeding, Docket No. 19989, was initiated as a result of revised tariff schedules filed by AT&T.[7] In that filing, AT&T proposed significant changes to the internal rate structure for Inward and Outward WATS.[8] A number of AT&T customers petitioned this Commission to reject or suspend and investigate the WATS tariff revisions. This Commission concluded the filing raised numerous questions of lawfulness.[9] Therefore, we suspended the proposed revisions and entered an accounting order, requiring AT&T to keep accurate records pertaining to the increased charges so that refunds could later be calculated if necessary. In addition, this Commission determined that a number of pending questions concerning the lawfulness of the WATS service offering should be consolidated and considered in this investigation. In particular, we decided to consolidate the issues pending in Docket No. 19129 and in Docket No. 19989.[10]

5. Docket No. 19989 was subsequently separated into two phases. Phase I examined the rate structure changes described above; Phase II examined the lawfulness of certain changes in the WATS tariff filed by AT&T in March 1975.[11] Phase II was deferred pending the completion of Phase I.[12] After a lengthy hearing, this Commission concluded that AT&T's WATS tariff filings made between 1973 and 1976 were unlawful for reasons relating primarily to the utilization by AT&T of an alignment method of ratemaking in determining WATS charges and to inadequacies in its cost support data.[13] In addition, this Commission found that the record was insufficient to enable us to prescribe WATS rates. Although this Commission found the tariff provisions to be unlawful, we determined that the public interest required that the rates remain in effect subject to an accounting order during the interim period while AT&T prepared a new tariff filing consistent with our decision.[14]

6. AT&T filed its revised WATS tariff in April 1977, which it claimed was in compliance with our *Final Decision*. A number of parties filed petitions opposing the tariff. This Commission determined that the April tariff filing was unlawful on its face and rejected it. We also stated that we would soon initiate a proceeding to determine whether MTS and WATS were "like services." This

Commission then ordered AT&T to file a fully-justified and lawful WATS tariff, and to submit certain WATS studies.[15]

7. Consistent with our stated intention, this Commission then initiated a proceeding to determine whether MTS and WATS were like services. We determined, based on the record before us, that the services were in fact "like," and as a result, AT&T was ordered to justify as reasonable any discrimination between WATS and MTS rates or to eliminate such discriminatory rates.[16]

8. At the same time this Commission was examining the like services issues, we also denied various petitions for reconsideration of our *Rejection Order* in Docket No. 19989 and ordered AT&T to provide studies to justify the discriminations and preferences it had created in its rate structures.[17] Finally, we established March 1, 1979, as the date by which AT&T was to submit a restructured WATS tariff that was responsive to this Commission's decision.[18] MCI, one of the petitioners, appealed the *Rejection Order*. The U.S. Court of Appeals for the District of Columbia Circuit declined to rule on MCI's appeal until we established a schedule for determining a just and reasonable WATS tariff and, accordingly, ordered this Commission to establish such a schedule.[19]

9. Pursuant to the schedule established by this Commission, AT&T filed its revised tariff in September 1980. This Commission determined that the tariff revision failed to incorporate a rate structure that directly minimized peak usage of the public switched network. Therefore, we suspended the tariff for the full statutory period and initiated CC Docket No. 80-765, Phase I, which looked toward implementation of a time-of-day sensitive WATS tariff. We also imposed an accounting order related to all amounts received by AT&T should the tariff become effective before the conclusion of the investigation.[20]

10. After examining the proposed WATS rate structure, we concluded that the failure of AT&T to incorporate peak/off peak, time-of-day pricing rendered the tariff unlawful. Therefore, we ordered AT&T to file a new tariff which incorporated the time-of-day rate structure element.[21] In addition, we noted that in its comments filed in Phase I of Docket 80-765, AT&T had proposed to devise a time-of-day rate structure element which could be incorporated into the September filing. We observed that this "hybrid structure" would provide incentives for off-peak use and represented a move toward more equitable rates for peak and off-peak users. Thus, this Commission authorized AT&T to file tariff revisions incorporating its proposal;[22] those revisions became effective on June 1, 1981.

11. This Commission then commenced Phase II of the CC Docket No. 80-765 investigation by examining the remaining issue raised by the September 1980 tariff filing -- whether prescription of a unified Public Switched Network tariff was warranted.[23] This Commission subsequently determined that such a prescription was not needed in view of the significant changes in the telecommunications marketplace due to the divestiture of the Bell Operating Companies from AT&T and the initiation of access charges. Accordingly, this Commission terminated the investigation and determined that no refunds were due.[24]

IV. AT&T COMMENTS

12. AT&T contends that the principal concerns of this Commission throughout the WATS investigations were whether WATS and MTS were like services and whether WATS rates were too low compared to MTS rates. According to AT&T, the like services issue was ultimately decided by the Court of Appeals for the District of Columbia Circuit, which found that MTS and WATS were not like services.[25] Moreover, AT&T contends, because this Commission did not find that AT&T's WATS rates were excessive, there is no basis upon which to award refunds.[26] Most importantly, says AT&T, it implemented a time-of-day sensitive rate schedule which this Commission determined was an acceptable means to promote off-peak usage.[27] AT&T argues that in view of these substantial changes in the WATS and 800 Service offerings since this Commission's acounting orders were first imposed in 1973, the rate structure issues that this Commission originally sought to address in our investigations are effectively rendered moot.[28] Finally, AT&T maintains that in these investigations this Commission was concerned with certain features of the WATS rate structure, such as rate tapers and group average billing.[29] According to AT&T, these issues were resolved by this Commission in our decision to terminate Phase II of CC Docket No. 80-765.[30]

V. DISCUSSION

13. No regulatory purpose would be served by continuing these WATS investigations or accounting orders. As AT&T correctly notes, throughout the lengthy investigations of AT&T's WATS tariffs, this Commission has been concerned that AT&T's WATS rates might be too low, when compared to MTS rates, rather than too high. Thus, there is no possibility that this Commission would award refunds to customers for excessive rates in these investigations. In addition, since the initiation of these investigations, AT&T filed a time-of-day sensitive rate structure for WATS which became effective in June 1981, and eliminated from its WATS tariff the rate tapers and Group Average Billing features questioned by this Commission. Therefore, our other major concerns with AT&T's WATS tariff have either been resolved or rendered moot.

14. In addition to these changes in AT&T's WATS tariff which render these investigations moot, other changes in the telecommuncations market since the 1970s make further Commission action in these investigations unnecessary. These changes were recently discussed in this Commission's Order terminating Phase II of CC Docket No. 80-765. In that Order, we noted, for example, that the divestiture of the Bell Operating Companies from AT&T acted as a catalyst, prompting changes in our regulation of the telecommunications industry.[31] In addition, this Commission noted that our access charge plan, which became effective simultaneously with divestiture, reflected our effort to allow full and fair competition in interexchange services.[32]

15. The *Phase II Final Order* also notes the growth of resellers, which brought the lower prices of WATS to individual customers. We explained that because of the presence of WATS resellers, AT&T's ability to charge different rates for services which are close supply substitutes was significantly decreased. This Commission stressed our belief that arbitrage from WATS resale has substantially reduced the possibility of price discrimination, and that the competitive pressures of resale and

competition have encouraged development of the many new services and options available to smaller customers, such as Reach Out America.[33]

16. The *Phase II Final Order* found that market conditions in a post-divestiture environment also served to facilitate competition in the MTS arena. We noted in that Order the presence of heightened competition and technological development which has in turn led to the proliferation of new, lower-priced services that are better suited to customer needs. This Commission observed that AT&T and its competitors now offer numerous service alternatives, providing a variety of options to their customers. In sum, we noted that the telecommunications marketplace has evolved into an arena where AT&T's ability to discriminate by means of its WATS rates has been effectively curtailed by the availability of competitive service offerings and by an open resale environment.[34]

VI. ORDERING CLAUSES

17. On the basis of the foregoing discussion, we find the investigations inititated in Docket No. 19129, Docket No. 19989, and CC Docket No. 80-765 to be moot and therefore terminated by this Order. In addition, any accounting orders imposed in those investigations are likewise terminated.

18. Accordingly, IT IS ORDERED that the petition filed by the Southern New England Telephone Company IS GRANTED to the extent indicated herein.

19. IT IS FURTHER ORDERED that the investigations and accounting orders initiated in Docket No. 19129, Docket No. 19989, and CC Docket No. 80-765, Phase I, ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX
LIST OF OPEN ACCOUNTING ORDERS

ENFIA

AT&T Transmittal Nos. 43 and 45, Mimeo No. 1425, released Jan. 6, 1982 (Com.Car.Bur.).

AT&T Transmittal No. 56, Mimeo No. 5704, released Aug. 10, 1982. (Com.Car.Bur.).

AT&T Transmittal No. 53, 90 FCC 2d 202 (1982).

GENERAL RATE INCREASES

AT&T, Docket No. 20732, 58 FCC 2d 1 (1976).

AT&T, Charges for Interstate Service, Mimeo No. 32427, released June 13, 1980 (Com.Car.Bur.).

AT&T, Transmittal Nos. 13703-13708, et al., 86 FCC 2d 956 (1981).

PRIVATE LINE PROCEEDINGS

AT&T, Docket No. 18128 (TELPAK), 13 FCC 2d 853 (1968).

AT&T, Docket No. 18128 (TELPAK), 20 FCC 2d 383 (1969).

AT&T, Docket No. 18128 (TELPAK), 33 FCC 2d 522 (1972).

AT&T, Docket No. 20736, 58 FCC 2d 899 (1976).

AT&T, Docket No. 20814, 59 FCC 2d 428 (1976).

AT&T, Docket No. 79-138, 72 FCC 2d 313 (1979).

WATS AND 800 SERVICES

AT&T, Docket No. 19129, 40 FCC 2d 18 (1973).

AT&T, Docket No. 19989, 46 FCC 2d 81 (1974).

AT&T, CC Docket No. 80-765, Phase I, 86 FCC 2d 820 (1981).

FOOTNOTES

[1] SNET Petition for Review of Accounting Orders Imposed in Tariff Investigations, 4 FCC Rcd 5500 (1989) (*ENFIA Order*); General Rate Increases, FCC 89-294, released Nov. 3, 1989; TELPAK and Other Private Line Rate Investigations, FCC 89-313, rel. Nov. 30, 1989.

[2] Commission Establishes Pleading Cycle for Petitions Concerning Southern New England Telephone Company's Petition for Review of Outstanding Accounting Orders, 2 FCC Rcd 5262 (1987).

[3] The parties filing comments are: Ameritech Operating Companies, American Telephone and Telegraph Company (AT&T), BellSouth Telephone Companies (BellSouth), Cincinnati Bell Telephone, Contel Corporation, GTE Telephone Companies, MCI Telecommunications Corp. (MCI), Southwestern Bell Telephone Company (SWB), and United States Telephone Association (USTA). Reply comments were filed by BellSouth, MCI, SWB, USTA, Pacific Bell and Nevada Bell, Bell Atlantic Telephone Companies, and SNET. The comments are summarized in the *ENFIA Order*, 4 FCC Rcd at 5500-01.

[4] *See ENFIA Order*, 4 FCC Rcd at 5500-01.

[5] *Id.* at 5501. The four groups, as identified by AT&T in its comments, are as follows: accounting orders associated with Exchange Network Facilities for Interstate Access (ENFIA); accounting orders associated with across-the-board rate increases filed between 1976 and 1981 for AT&T's switched and private line services (General Rate Increases); accounting orders associated with investigations of AT&T's private line tariffs, specifically AT&T's compliance with the Fully Distributed Cost (FDC) methodology in Docket No. 18128 (TELPAK); and accounting orders associated with AT&T's WATS and 800 Service tariffs filed during the 1970s and early 1980s (WATS).

[6] AT&T and the Bell System Operating Companies, Charges for Interstate Telephone Service, Docket No. 19129, Decision and Order, 38 FCC 2d 213, 251 (1972), *aff'd.*, Nader v. FCC, 520 F. 2d 182 (D.C. Cir. 1975).

[7] AT&T, Revisions to Tariff F.C.C. No. 259, WATS, Memorandum Opinion and Order, Docket No. 19989, 46 FCC 2d 81 (1974).

[8] *Id.* at 86.

[9] *Id.* at 84.

[10] *Id.* at 84-85.

[11] AT&T, Revisions to Tariffs F.C.C. Nos. 259, 260, and 267, Memorandum Opinion and Order, Docket No. 19989, Phase II, 52 FCC 2d 155 (1975).

[12] AT&T, Memorandum Opinion and Order, Docket No. 19989, 58 FCC 2d 1008 (1976).

[13] AT&T, Revisions to Tariff F.C.C. No. 259, WATS, Docket No. 19989, Final Decision and Order, 59 FCC 2d 671 (1976) (*Final Decision*). AT&T's alignment method was founded upon the theory that charges for WATS may be justified solely on the basis of maintaining consistent rate relationships over distance between WATS and MTS rates. Therefore, according to AT&T, independent cost of service studies were not required to support or explain WATS charges resulting from alignment. *Id.* at 676-77.

[14] *Id.* at 709-10.

[15] AT&T, Revisions to Tariff F.C.C. No. 259, WATS, Transmittal No. 12745, Memorandum Opinion and Order, Docket No. 19989, 66 FCC 2d 9, 63 (1977) (*Rejection Order*).

[16] AT&T, Docket No. 21402, Notice of Inquiry, 66 FCC 2d 224 (1977); Final Decision and Order, 70 FCC 2d 593 (1978), *recon. denied*, 79 FCC 2d 10 (1980). This decision was reversed two years later. *See* n. 25 *infra*.

[17] AT&T, Revisions to Tariff F.C.C. No. 259, WATS, Transmittal No. 12745, Memorandum Opinion and Order, 69 FCC 2d 1672 (1978).

[18] *Id.* at 1694.

[19] MCI Telecommunications Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980).

[20] AT&T, Revisions to Tariff F.C.C. No. 259, WATS, Memorandum Opinion and Order, CC Docket No. 80-765, Phase I, 84 FCC 2d 158, 212 (1981). Phase II was initiated in April 1982 to resolve the remaining rate structure and cost issues designated for investigation after the conclusion of the time-of-day phase of the investigation. AT&T, Revisions to Tariff F.C.C. No. 2, WATS, CC Docket No. 80-765, Phase II, Memorandum Opinion and Order, 89 FCC 2d 889 (1982).

[21] AT&T, Docket No. 80-765, Phase I, Revisions to Tariff F.C.C. No. 259, WATS, Memorandum Opinion and Order, 86 FCC 2d 820 (1981), *appeal denied sub nom.* Southern Pacific Communications Company v. FCC, 682 F.2d 232 (D.C. Cir. 1982).

[22] *See id.* at 856.

[23] AT&T, Revisions to Tariff F.C.C. No. 259, WATS, Memorandum Opinion and Order, CC Docket No. 80-765, Phase II, 89 FCC 2d 889, 891-902 (1982).

[24] AT&T, Revisions to Tariff F.C.C. No. 2, Wide Area Telecommunications Service, Memorandum Opinion and Order, CC Docket No. 80-765, Phase II, 4 FCC Rcd 5389 (1989) (*Phase II Final Order*).

[25] *See* Ad Hoc Telecommunications Users Committee v. FCC, 680 F2d 790 (D.C. Cir. 1982).

[26] AT&T Comments at 13 (citing AT&T, Revisions of Tariffs F.C.C. Nos. 259, A60, 263, 264, and 267, Transmittal No. 12497, Memorandum Opinion and Order, Docket No. 20732, 58 FCC 2d 1 (1976); AT&T, Charges, Regulations, Classifications and Practices for Voice Grade/Private Line Service (High Density-Low Density) Filed with Transmittal No. 11891, Memorandum Opinion and Order, Docket No. 19919, 58 FCC 2d 362 (1976); AT&T, Revisions to Tariff F.C.C. No. 259, WATS, Memorandum Opinion and Order, Phase II, CC Docket No. 80-765, 89 FCC 2d 889 (1982)).

[27] *Id.* at 12.

[28] *Id.*

[29] Rate tapers referred to four rate periods reflecting increases in monthly usage per WATS access line. Group Average Billing was a feature of the WATS tariff which provided that a customer's usage is to be averaged over the number of access lines in a WATS service group. AT&T, Revisions to Tariff F.C.C. No. 259, WATS, Memorandum Opinion and Order, Phase II, CC Docket 80-765, 89 FCC 2d at 902, 904, (1982).

[30] *Phase II Final Order*, 4 FCC Rcd at 5391-92.

[31] *Id.* at 5391.

[32] *Id.*

[33] *Id.*

[34] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 89-554

In the Matter of

An Inquiry Relating to Preparation
for the International Telecommunication
Union World Administrative
Radio Conference for Dealing
with Frequency Allocations in
Certain Parts of the Spectrum

NOTICE OF INQUIRY

Adopted: November 28, 1989; Released: December 13, 1989

By the Commission:

1. This proceeding is established in order to generate public comment regarding Commission preparations for an International Telecommunication Union (ITU) World Administrative Radio Conference (WARC) for dealing with frequency allocations in certain parts of the spectrum. The agenda for the conference, which is currently scheduled to be held during the first quarter of 1992, will be developed taking into account allocation issues contained in the Resolutions and Recommendations relating to frequency allocations that were adopted at three prior ITU conferences: WARC for the Planning of the HF Bands Allocated to the Broadcasting Service, Second Session, 1987 (WARC HFBC-87); WARC for the Mobile Services, 1987 (WARC MOB-87); and WARC on the Use of the Geostationary Satellite Orbit and on the Planning of Space Services Utilizing It, Second Session, 1988 (WARC ORB-88). In addition, the 1992 conference should consider Articles 55 (Rev.) and 56 (Rev.) and Appendix 26 of the international Radio Regulations and may consider defining certain new space services and allocations to these services in frequency bands above 20 GHz. This proceeding will assist Commission efforts, in coordination with the National Telecommunications and Information Administration (NTIA) and the Department of State (DOS), in the formulation of United States proposals and policy for the 1992 conference.

I. BACKGROUND

2. The last general spectrum allocations conference was held in 1979 (WARC-79). At WARC-79, administrations agreed to a program of specialized WARCs for the ensuing decade. The ITU members also recognized that, in the future, there could be a need for a general or partial revision of the international Radio Regulations, especially for services not covered by the specialized conferences scheduled for the 1980s. WARC-79 adopted Recommendation 13, calling on the ITU Administrative Council to consider, as from 1990, whether it would be necessary to convene a WARC for such purposes.

3. The issue of scheduling future conferences during the 1990s was discussed at both the 43rd Administrative Council (1988) and the 44th Administrative Council (1989). In particular, the 44th Administrative Council considered the possibility of a spectrum allocations conference in 1992; however, it did not advise the 13th Plenipotentiary Conference (Plenipot), which was held in Nice, France, May 23-June 29, 1989, on a schedule of future conferences.[1] The Nice Plenipot faced a difficult task because the specialized WARCs that were held during the 1980s resulted in the adoption of over 100 Resolutions and Recommendations requesting actions by a future competent WARC. Ultimately, administrations at the Nice Plenipot agreed that a WARC should be held in 1992 for dealing with frequency allocations in certain parts of the spectrum, as described below:

(a) WARC-92 will take into account the Resolutions and Recommendations of WARC HFBC-87, WARC MOB-87 and WARC ORB-88 relating to frequency allocation (*see* Resolution PL-B/1);

(b) WARC-92 also may consider defining certain new space services and consider allocations to these services in frequency bands above 20 GHz (*see* Resolution PL-B/1);

(c) WARC-92 will consider modifications to Article 12 to reflect changes to the aeronautical mobile (OR) frequency allotment plan in Appendix 26 (*see* Resolution PL-B/2); and

(d) WARC-92 will consider the provisions of Articles 55 (Rev.) and 56 (Rev.) of the Radio Regulations, as amended by WARC MOB-87, regarding on-board maintenance of shipborne radio and electronic equipment (*see* Resolution PLEN/8).

In Appendix A, we provide the texts of Resolutions PL-B/1, PL-B/2 and PLEN/8 from the Final Acts of the Nice Plenipot.

4. The agenda for WARC-92 will be established by the Administrative Council. We anticipate that the agenda for WARC-92 will be considered at the Administrative Council scheduled for Spring, 1990. The Administrative Council also will establish the exact dates for the conference which, according to Resolution PL-B/1, is scheduled for the first quarter of 1992 for four weeks and two days in Spain. Comments received in this proceeding will aid in the development of U.S. positions on the WARC-92 agenda and its schedule when it is addressed at the Administrative Council meeting.

5. Based on the rather broad directives provided in Resolution PL-B/1, the potential agenda for WARC-92 encompasses numerous services and issues and a wide range of frequency bands. We anticipate that the Administrative Council will define more specifically the services and frequency bands to be considered by WARC-92. Nonetheless, given the relatively short time period available for conference preparations, it is important that the Commission, along with other U.S. government agencies, begin formal preparations for WARC-92 at this time. Given these circumstances, we believe it is useful to summarize briefly the major accomplishments of HFBC-87, WARC MOB-87 and WARC ORB-88 and to highlight some of the outstanding issues posed by those three major conferences. In Appendix B, we have prepared a preliminary list of the Resolutions and Recommendations from

each of these conferences that may be relevant to the potential agenda of WARC-92.[2] In view of the relatively short amount of time allotted for the conference, the WARC-92 agenda should include only those items that are urgent in nature and are predominantly allocation oriented. Commenters are invited to address the selection of those Resolutions and Recommendations listed in Appendix B and any others that are essentially allocation oriented, urgent in nature and essential to U.S. interests. We want to emphasize that WARC-92 will be concerned with international allocation issues. The future impact on U.S. domestic radio communications services would depend on a decision by the Commission to implement any new international allocation changes, subject to notice and comment in a Rule Making proceeding.

II. HFBC - 87

6. HFBC-87 was the second session of a two-part conference concerning planning of High Frequency (HF) bands between 5950 and 26100 kHz that are allocated to the broadcasting service. HF frequencies are used for both domestic and international broadcasting purposes by numerous administrations. The U.S. government sponsors two international broadcasting services on HF frequencies, the Voice of America and Radio Free Europe/Radio Liberty, and the Commission authorizes international HF broadcast stations that are privately owned. [3] The main issue addressed at HFBC-87 was whether to replace the current procedures (Article 17 of the international Radio Regulations) for coordinating HF broadcast use, which are based on voluntary consultations between governments, with a computer based central planning system to be managed by the International Frequency Registration Board (IFRB), a permanent organ of the ITU. The conference ultimately adopted broad planning principles and deferred any decision on a new planning system. The conference authorized the IFRB to revise the computer planning system then under consideration and to conduct further planning exercises in parts of certain bands. The Nice Plenipot has scheduled a WARC for 1993 for dealing with matters connected with the planning of the broadcasting service in the HF bands, and the agenda for that conference is to take into account the Resolutions and Recommendations of HFBC-87 relating to the HFBC Planning System and procedures (*see* Resolution No. PL-B/1). Unless the 1993 conference decides otherwise, the current frequency coordination procedures will remain in force.

7. Another major issue addressed at HFBC-87 was spectrum allocations. Additional spectrum had been allocated for broadcasting services by WARC-79 at 9 MHz and above 10 MHz.[4] These so-called "expansion bands" were the subject of a two-session planning conference (*i.e.*, WARC HFBC-84 and HFBC-87) and were to come into use in two stages: above 10 MHz in 1989 and 9 MHz in 1994. No additional allocations were made at 6 MHz or 7 MHz, which is the spectrum used by most HF broadcasting operations, because of the ongoing requirements of existing radio services in this portion of the spectrum. The U.S. and twenty-one other administrations protested the inadequacy of the allocations in formal reservations to the Final Acts of WARC-79. At HFBC-87, the U.S. and other administrations continued to press their view that the current and future needs of HF broadcasting required the allocation of additional spectrum. HFBC-87 adopted Recommendation 511 concerning the possibility of extending the spectrum allocated exclusively to HF broadcasting at a future competent WARC with the aim of planning that spectrum within the framework of the improved HFBC Planning System. Four countries (Argentina, Colombia, Honduras and Mexico) entered formal reservations to the Final Acts on this issue. When HFBC-87 failed to agree to the implementation of the proposed HFBC Planning System and the procedures under consideration, administrations adopted Resolution 512 whereby the expansion bands above 10 MHz will not come into use until a date to be decided by a future planning conference (*see* discussion in paragraph 6 on 1993 HF conference). Nonetheless, the U.S. and some other administrations use the expansion bands for HF broadcasting under No. 342 of the international Radio Regulations, whereby administrations may assign frequencies provided harmful interference is not caused to services operating in accordance with the Radio Regulations.

8. At the conclusion of HFBC-87, the U.S. submitted a four-part protocol statement to the Final Acts.[5] The U.S. restated its view that WARC-79 did not provide adequate allocations for HF broadcasting and consequently it would not be possible to plan all frequency bands to satisfy all countries' HF broadcasting needs without additional spectrum. In the other parts of its HFBC-87 protocol statements, the U.S. reserved its position as to the financial costs and future implementation of the HFBC Planning System, including the effects of harmful interference in contravention of Article 35 of the Convention ("jamming") on the implementation of planning procedures and the provision of broadcasting service.

9. Given the results of HFBC-87 and the fact that another HF planning conference will follow WARC-92, we seek comments in the following areas:

(a) What are the projected frequency needs of the HF broadcasting service, taking into account the expansion bands whose use has been deferred by HFBC-87? What are the bases for these projections?

(b) Do allocations have to be exclusive *e.g.*, geographic, time-sharing?

(c) Should new allocations be regional or worldwide?

(d) What other issues, consequential to allocating additional spectrum for HF broadcasting services, may need to be addressed by WARC-92?

III. WARC MOB - 87

10. WARC MOB-87 was designed to review and revise the international Radio Regulations concerning the mobile services, the mobile satellite services, and the radionavigation and radiodetermination satellite services. The conference also was charged with incorporating in the Radio Regulations provisions for implementing a Global Maritime Distress and Safety System (GMDSS) and, further, with considering the provision of aeronautical public correspondence (*i.e.*, public telephone service) with aircraft. MOB-87 was very broad in scope and dealt with a number of frequency allocation and regulatory issues concerning not only terrestrial mobile services and specialized mobile services (*e.g.*, maritime positioning services) but also new mobile satellite services (*e.g.*, land mobile and radiodetermination satellite services).

11. MOB-87 concluded with several major accomplishments. Primarily, the conference adopted a new Chapter N IX of the Radio Regulations to implement the future GMDSS system. In addition, spectrum was reallocated in the 1.5 and 1.6 GHz bands for new land mobile satellite services (LMSS)[6] and in the 1.6, 2.4 and 5.1 GHz bands for radiodetermination satellite services (RDSS).[7] The U.S., however, reserved its position on the 1.5 and 1.6 GHz LMSS allocation decisions in a protocol statement to the Final Acts.[8] In other actions, maritime mobile allocations in the HF bands were revised. In particular, allocations made by WARC-79 for maritime mobile services were implemented by MOB-87, and the 4 and 8 MHz shared bands were used to increase the number of duplex channels in the radiotelephone plan.

12. Numerous other decisions were taken at MOB-87. For example, requirements regarding radio operator and radio equipment maintenance personnel aboard ships were adopted and added to Articles 55 and 56 of the Radio Regulations. However, twenty-three countries, including the U.S., submitted reservations to the Final Acts on the maintenance personnel requirement.[9] At the Nice Plenipot, four additional countries took the same reservation.[10] In other areas, spectrum was allocated in the 1.5 and 1.6 GHz bands for terrestrial public correspondence with aircraft.[11]

13. There are several areas that, although they were addressed at MOB-87, are potential topics for the WARC-92 agenda. By Resolution No. 208, MOB-87 recommended that a WARC be convened no later than 1992 to consider additional allocations for mobile satellite and other mobile services in the 1-3 GHz range. European countries seem particularly interested in this subject because of their desire to develop Pan-European mobile systems of various types after 1992. European interests also include additional spectrum for international digital land mobile systems (*see, e.g.*, Recommendation No. 205, MOB-87). At MOB-87, a footnote change to the international Table of Frequency Allocations was adopted to allow twelve countries in Region 1 to use the 1700-2450 MHz band on a primary basis for land mobile services subject to Article 14 of the international Radio Regulations. In Region 2, the 1700-2450 MHz band is already allocated to the mobile services on a primary basis, and thus this allocation issue does not appear to be a concern for the U.S. private sector.

14. We pose several general questions on the mobile services considered at WARC MOB-87 (*e.g.* mobile-satellite, aeronautical, RDSS, maritime) and request specific comments on the following matters:

(a) Which of these mobile services may need additional spectrum during the 1990s? What are the projected frequency needs (amount and bands) of these services? What are the bases for these projections?

(b) How can those additional spectrum needs be met in the 500-3000 MHz range? Can some allocations be on a shared basis? If yes, what sharing criteria would be required?

(c) What other issues, consequential to reallocating spectrum for mobile services, may need to be addressed by WARC-92?

15. As discussed above at paragraph 3, WARC-92 also will consider one specific topic that was addressed at MOB-87. By Resolution PLEN/8, the Nice Plenipot has instructed the Administrative Council to include on the WARC-92 agenda consideration of Articles 55 (Rev.) and 56 (Rev.) of the Radio Regulations, as amended by MOB-87, regarding requirements for on-board maintenance of shipborne radio and electronic equipment.[12]

IV. WARC ORB - 88

16. WARC ORB-88 was the second session of a two-part conference on space services generally referred to as Space WARC; the first session took place in 1985 (WARC ORB-85). WARC-79 had called for a two session WARC on the use of the geostationary satellite orbit and the planning of space services utilizing it. By adoption of Resolution 3, WARC-79 had expressed administrations' concerns that there is a need for equitable access to, and efficient and economical use of, limited orbit and spectrum resources by all countries, and that the goal of the proposed Space WARC was to address these issues. The two session Space WARC concentrated primarily on Fixed-Satellite Service (FSS) and Broadcasting-Satellite Service (BSS) issues.

17. Space WARC adopted a dual planning approach for the FSS. ORB-88 established an FSS Allotment Plan, whereby administrations are allotted a nominal orbital position within a predetermined arc, minimum bandwidth in designated frequency bands (expansion bands) and a specified service area intended to meet national service requirements.[13] For other FSS bands (conventional bands) subject to Improved Regulatory Procedures, ORB-88 determined that when an administration incurs major difficulty in obtaining coordination agreements, it may use certain additional procedures (*i.e.*, multilateral planning meetings).

18. There were a number of topics addressed at ORB-88 that are potential issues for WARC-92 as well. By Resolution COM 5/1, ORB-88 called for a future conference to consider an allocation for satellite sound broadcasting (BSS Sound), including feeder links. Such an allocation could be used to provide wide area, high quality service to listeners with portable and automobile receivers. Noting similarities of transmission characteristics between BSS Sound and mobile-satellite service, the resolution called for an allocation for BSS Sound in the 500-3000 MHz frequency range. The resolution also invited the CCIR to pursue technical studies on BSS Sound in that frequency range and to submit a report to the WARC that will be considering this topic. As noted by ORB-88, consideration of an allocation for BSS Sound at 500-3000 MHz would complement calls by HFBC-87 to revise the HF allocations for broadcasting service and by MOB-87 to revise partially the allocations at 1000-3000 MHz. ORB-88 also expressed concern about space research and space operation services below 3000 MHz and by Recommendation COM 6/F urged that the next competent WARC examine the increased coordination difficulties faced by these services, including difficulties in obtaining agreements under Article 14. In another area, by Resolution COM 5/3, ORB-88 called for a future conference to consider allocations for wide RF-band high definition television (HDTV) broadcasting by satellite, including feeder links, preferably on a world-wide basis. Although it noted that certain types of HDTV can be provided in the 11.7-12.7 GHz

band that is included in the BSS plan, the resolution cited the 12.7-23 GHz frequency range as the appropriate band from which to select a world-wide allocation. According to the resolution, such an allocation could be used to provide higher quality HDTV than that possible at 12 GHz by allowing the use of wide bandwidth channels world-wide.

19. WARC-92 also presents the opportunity to make available additional frequency bands, especially above 20 GHz, for a variety of new space services. For example, the U.S. space program could use additional spectrum for deep space exploration, advanced tracking and data relay satellite systems, space stations and commercialization of space initiatives. The Nice Plenipot has authorized the Administrative Council to consider for the WARC-92 agenda defining new space services and allocating to those services spectrum above 20 GHz, as discussed at paragraph 3.

20. We therefore pose several general questions on space services and request specific comments in these areas:

(a) Is there a requirement for BSS Sound or HDTV by satellite in the U.S.? What are the projected spectrum needs of each of these services recognizing that use of the UHF television band is not practical in the U.S. for BSS Sound?[14] What are the bases for these projections?

(b) Should allocations for BSS Sound or HDTV by satellite be exclusive or on a shared basis? If specific bands are suggested, what other services or existing systems could be affected by reallocations for BSS Sound and HDTV? If there is a requirement, is it necessary to have a worldwide allocation for HDTV by satellite, as called for in Resolution COM 5/3? Why aren't the existing allocations at 12 GHz and 23 GHz sufficient to meet the narrow and wide RF-band HDTV by satellite requirements?

(c) What new space services above 20 GHz will need access to spectrum during the 1990s? Describe the space activities that would comprise these new services.

(d) What are the projected frequency needs of proposed new space services above 20 GHz? Would the allocations be exclusive or on a shared basis? If on a shared basis, what services are compatible and what sharing criteria would be required?

(e) What other issues, consequential to allocating spectrum to the space services, may need to be addressed by WARC-92?

V. OTHER WARC - 92 ISSUES

21. By Resolution No. PL-B/2, the Nice Plenipot instructed the IFRB to prepare a draft channelling arrangement for the frequency bands in the Frequency Allotment Plan for the Aeronautical Mobile (OR) service (Appendix 26 of the international Radio Regulations), to obtain the views of all administrations on the proposed channelling arrangement, and to prepare for consideration by WARC-92 the minimum modifications of Article 12 of the Radio Regulations to effect the proposed changes to the plan. The resolution also states that the proposed changes to the plan will be in effect at 0001 hours UTC on 15 December 1992, subject to confirmation by WARC-92. We view the resolution of this issue as an Executive Branch matter and therefore U.S. proposals and positions will be developed under the auspices of NTIA.

22. WARC-92 also will need authority to make consequential modifications to the international Radio Regulations that are necessitated by actions on the specific matters ultimately contained on the agenda. At times, procedural regulations also may need to be modified in order to accomplish successfully allocation changes. For example, as noted in paragraph 18 discussing space research operations below 3 GHz, it is sometimes difficult to reach agreements under Article 14 procedures. While it is possible to list other examples of potential consequential modifications, some caution should be observed in granting WARC-92 authority to make consequential modifications. Given the relatively short time period scheduled for WARC-92, the conference will most likely have to focus its attention on selected topics. Thus, commenters should highlight those consequential modifications they believe are a logical consequence of acting on suggested allocation changes.

VI. ADDITIONAL MATTERS

23. A substantial amount of international and domestic preparatory activity will precede WARC-92. At the international level, the conference preparatory activities will be performed by various international organizations and by various ITU components such as the Administrative Council, the IFRB, and the CCIR and its Study Groups. Commission staff members, representatives from other government agencies, and U.S. private industry representatives will be participating in meetings of these international organizations. The CCIR, based on recommendations from its Study Groups, is currently in the process of establishing an overall Joint Interim Working Party (JIWP-WARC 1992) to prepare a consolidated report for WARC-92 on the technical aspects of items that may be included on the WARC-92 agenda. The CCIR Study Groups are forming individual Interim Working Parties (IWPs) or Joint Interim Working Parties (JIWPs) that will be addressing WARC-92 agenda items relevant to the interests of the different Study Groups. The individual IWPs and JIWPs will prepare reports for submission to the JIWP-WARC 1992 for consideration. These groups will be concentrating on those topics identified for CCIR study in relevant Resolutions and Recommendations adopted by HFBC-87, MOB-87 and ORB-88, some of which are discussed in this Notice of Inquiry.

24. In the U.S., government conference preparations have begun and, are being conducted by the Interdepartment Radio Advisory Committee (IRAC) and its Ad Hoc 206 interagency group. Ad Hoc 206 will be responsible for coordinating the preparatory activities of affected government agencies that use frequencies allocated for the government's telecommunications needs. IRAC will make its conference recommendations to NTIA, which is responsible for developing Executive Branch telecommunications policies. NTIA's recommendations for U.S. policy and proposals will then be forwarded to the Department of State for coordination with the Commission's recommendations. Because the Commission participates in IRAC through a liaison repre-

sentative, we expect the Commission's and NTIA's recommendations for U.S. proposals to be generally consistent with each other.

25. The Commission intends to establish a joint industry/government advisory committee to assist it in preparing for WARC-92. The advisory committee will be governed by the provisions of the Federal Advisory Committee Act of 1972, as amended.[15] The Commission has used similar advisory committees to assist in preparations for previous ITU conferences (*e.g.*, Space WARC). The Commission will consider reports from the advisory committee in making its own recommendations for U.S. proposals. The Commission's recommendations will be contained in a Report and Order in this proceeding, and they also will be forwarded to the Department of State for coordination with NTIA's recommendations, as discussed above.

26. As conference preparatory activities proceed both internationally and domestically, potential issues for WARC-92 will be more specifically identified. When the agenda for WARC-92 is established by the ITU Administrative Council, preparatory activities will have a clearer focus and U.S. views on the designated agenda items will have to be clarified. Thus, we intend to issue a Further Notice in this proceeding to deal with more specific issues.

27. Authority for this Notice of Inquiry is contained in Section 4(i), 303(r) and 403 of the Communications Act of 1934, as amended. All submissions by parties to this proceeding or persons acting on behalf of such parties must be in written comments, reply comments or other appropriate pleadings. Reply comments must be served on the person(s) who filed comments to which the reply is directed. The Commission may take into consideration ideas and information not contained in the comments, provided that such information or a writing indicating its nature or source is placed in the public file, or is otherwise publicly available, and provided that the Commission's reliance on such information is noted in its written disposition of this proceeding. Pursuant to Section 1.1204(a)(4) of the Commission's Rules, no ex parte restrictions apply in this proceeding.

28. Pursuant to applicable provisions set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before February 16, 1990, and reply comments on or before March 16, 1990. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and 5 copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments shall be filed with the Secretary, Federal Communications Commission, 1919 "M" Street, N.W., Washington, D.C. 20554. All filings in this proceeding will be available for public inspection during regular business hours in the Docket Reference Room (Room 239) of the Federal Communications Commission, 1919 "M" Street, N.W., Washington, D.C. 20554.

29. The point of contact on this Notice of Inquiry is William Torak, Office of Engineering and Technology, (202) 632-7025.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

RESOLUTION No. PL-B/1

Future Conferences of the Union

The Plenipotentiary Conference of the International Telecommunication Union (Nice, 1989),

having considered

a) section 3.4 of the Report of the Administrative Council to the Plenipotentiary Conference, relating to planned conferences;

b) the proposals submitted by several Members of the Union;

c) the necessary preparatory work to be carried out both by the permanent organs of the Union and by the administrations before each session of a Conference,

resolves

1. that the schedule of future conferences shall be as follows:

1.1 Second Session of the Regional Administrative Conference for the Planning of VHF/UHF Television Broadcasting in the African Broadcasting Area and Neighbouring Countries (Geneva, 13 November-8 December 1989);

1.2 Regional Administrative Conference of the Members of the Union in the African Broadcasting Area to Abrogate the Regional Agreement for the African Broadcasting Area (Geneva, 1963) (Geneva, 4-5 December 1989);

1.3 An additional Plenipotentiary Conference if so decided by the Administrative Council at its 1991 session (Geneva, two weeks);

1.4 World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum, taking into account the Resolutions and Recommendations of WARC HFBC-87, WARC MOB-87 and WARC ORB-88 relating to frequency allocation (Spain, first quarter of 1992, four weeks and two days);

1.5 World Administrative Radio Conference for Dealing with Matters Connected with the Broadcasting Service in the HF Band (Geneva, first quarter of 1993, four weeks);

1.6 Regional Administrative Radio Conference to Establish Criteria for the Shared Use of the VHF and UHF Band Allocated to Mobile, Broadcasting and Fixed Services and, if necessary, planning for the broadcasting service in all or part of Region 3

and countries concerned in Region 1, to be determined by the Administrative Council after consultation with Members concerned;

1.7 Plenipotentiary Conference (Japan, 1994, five weeks), to be confirmed by the Administrative Council at its 1991 session;

2. that:

2.1 the agendas for the conferences mentioned in sections 1.1 and 1.2 already established by the Administrative Council shall remain unchanged;

2.2 the agenda for the Conference mentioned in section 1.4 shall be established by the Administrative Council, taking into account the Resolutions and Recommendations of WARC HFBC-87, WARC MOB-87 and WARC ORB-88 relating to frequency allocations; in addition this Conference may consider defining certain new space services and consider allocations to these services in frequency bands above 20 GHz;

2.3 the agenda for the conference mentioned in section 1.5 shall be established by the Administrative Council taking into account the Resolutions and Recommendations of WARC HFBC-87 relating to the HFBC Planning System and procedures;

3. that the conferences shall be held within the period indicated in section 1 above, the precise dates being set by the Administrative Council after consulting the Members of the Union, and leaving sufficient time between the various conferences. However, in cases where precise dates are indicated, they shall not be changed. The durations indicated in section 1 above for conferences for which the agendas have already been established shall not be changed; the precise duration of the other conferences shall be decided by the Administrative Council after their agendas have been established, within the duration limits indicated in paragraph 1.

RESOLUTION No. PL-B/2

Improvement of Use by the Aeronautical Mobile (OR) Service of the Frequency Bands Governed by Appendix 26 to the Radio Regulations

The Plenipotentiary Conference of the International Telecommunication Union (Nice, 1989),

considering

a) that the Frequency Allotment Plan for the Aeronautical Service prepared by the International Administrative Aeronautical Radio Conference (Geneva, 1949) and adopted by the Extraordinary Administrative Radio Conference (Geneva, 1951) was substantially adopted by the Administrative Radio Conference (Geneva, 1959) and included in the Radio Regulations as Appendix 26;

b) that the Extraordinary Administrative Radio Conference (Geneva, 1966) adopted a separate Plan for the aeronautical mobile (R) service and decided to include this Plan in the Radio Regulations as Appendix 27;

c) that the World Administrative Radio Conference on the Aeronautical Mobile (R) Service (Geneva, 1978), adopted technical principles for establishing the Frequency Allotment Plan for the aeronautical mobile (R) service, in particular the use of the 3 kHz separation between carrier frequencies for certain classes of emission and powers which can be directly applied in establishing the Allotment Plan for the Aeronautical Mobile (R) Service;

d) that the Allotment Plan for the Aeronautical Mobile (OR) Service (Appendix 26) has not therefore been revised since the Administrative Radio Conference, (Geneva, 1959);

e) that, since 1959 many additional countries have become Members of the Union and therefore have no allotments in the Plan of Appendix 26;

f) that the World Administrative Radio Conference (Geneva, 1979) adopted Resolution No. 403 relating to the of the frequencies 3 023 and 5 680 kHz common to the aeronautical mobile (R) and (OR) services necessitating common characteristics between these mobile services for safety purposes,

recognizing

1. that the Plan for the Aeronautical Mobile (OR) Service contained in Appendix 26 of the Radio Regulations requires appropriate adjustments with a view to using modern technology and making more efficient use of the spectrum;

2. that the programme of conferences and meetings to be held in the period preceding the next Plenipotentiary Conference does not permit the convening of a planning conference;

3. that, pending the convening of such a conference, there is a need for early action to improve use by .the aeronautical mobile (OR) service of the frequency bands governed by Appendix 26;

4. that the action required by this Resolution is similar to that contained in Resolution 325, and that the IFRB should undertake the necessary action by a re-arrangement of its internal work priorities without the need for additional resources,

instructs the IFRB

1. to prepare a draft channelling arrangement for the frequency bands allocated to the aeronautical mobile (OR) service contained in Appendix 26 using the criteria adopted in this respect for the aeronautical mobile (R) service in Appendix 27;

2. to obtain the views of all administrations on the proposed channelling arrangement and to modify it in accordance with their comments to the extent practicable;

3. to propose to each administration concerned single sideband carrier frequencies intended to replace its allotment(s) in Appendix 26, with the minimum necessary frequency shift resulting from the new channelling arrangement, and to obtain its agreement to the proposed frequencies;

4. to inform administrations at an appropriate date of the need for them to transfer their operating stations to the new allotted channels on the date indicated under " *resolves* ";

5. to apply the procedures outlined in the annex to Resolution No. 325 (MOB-87) and in Article 16 of the Radio Regulations commencing with the requirements of those administrations which do not appear in Appendix 26;

6. to prepare for consideration by the WARC-1992 the minimum modifications of Article 12 of the Radio Regulations to take account of the above actions;

resolves

that, at 0001 hours UTC on 15 December 1992 (subject to confirmation by WARC-1992), administrations shall change the transmitting frequencies of their operating stations in the aeronautical mobile (OR) service to the replacement frequencies resulting from the action taken in accordance with this Resolution;

recommends

that, when considering Recommendation 406[1] of the WARC-79, the next Plenipotentiary Conference, should take account of the results of the action taken in accordance with this Resolution;

instructs the Administrative Council

to include in the agenda of the WARC to be held in 1992 the consideration of modifications of Article 12 of the Radio Regulations in order to take account of the actions taken as a result of this Resolution.

RESOLUTION No. PLEN/8

Examination of Certain Provisions of the Radio Regulations

The Plenipotentiary Conference of the International Telecommunication Union (Nice, 1989),

considering

a) that in Document 73 the Secretary-General informed the Conference that reservations and statements were submitted by Members of the Union after the closure of the World Administrative Radio Conference for the Mobile Services (Geneva, 1987) (WARC MOB-87);

b) that those reservations and statements relate to new obligations arising under Articles 55(Rev.) and 56(Rev.) of the Radio Regulations relating to the mandatory carriage on board ships of personnel certificated for the on-board maintenance of shipborne radio and electronic equipment;

c) that the Final Protocol signed on 17 October 1987 and contained in the Final Acts of WARC MOB-87 includes, *inter alia*, statement No. 51 made by 22 Members of the Union concerning the provisions of Articles 55(Rev.) and 56(Rev.) of the Radio Regulations revised by that Conference;

d) that the statements referred to in Document 73 have the same tenor as the above-mentioned statement,

recognizing

the desirability of finding an appropriate solution to this problem,

instructs the Administrative Council

to include in the agenda of the next world administrative radio conference, to be held in 1992, the consideration of the provisions of Articles 55(Rev.) and 56(Rev.) of the Radio Regulations, as amended by WARC MOB-87.

APPENDIX B

Relevant Resolutions and Recommendations for Possible Consideration by WARC - 92

A. *HFBC - 87*

1) *Recommendation No. 511:* Possibility of Extending the Frequency Spectrum Allocated Exclusively to HF Broadcasting at a Future Competent World Administrative Radio Conference.

B. *WARC MOB-87*

1) *Resolution No. 208:* Extension of the Frequency Bands Allocated to the Mobile-Satellite and Mobile Services and Their Conditions of Use.

C. *WARC ORB-88*

1) *Resolution COM 5/1:* Future Change in Article 8 for the Broadcasting-Satellite Service (Sound) in the Frequency Range 500 MHz to 3000 MHz.

2) *Resolution COM 5/3:* Selection of a Frequency Band for Use by the Broadcasting-Satellite Service and Intended for Wide RF-Band High Definition Television and of an Associated Frequency Band for HDTV Feeder Links, and the Adoption of Related Provision by a Future Competent Conference.

3) *Recommendation COM 6/F:* Use of Certain Frequency Bands Below 3000 MHz by the Space Research and Space Operation Services.

FOOTNOTE FOR APPENDIX

[1] Recommendation 406 - "Relating to the Revision of the Frequency Allotment Plan for the Aeronautical Mobile (OR) Service".

FOOTNOTES

[1] The Plenipotentiary Conference is the supreme body of the ITU. It meets normally every five to six years and determines the general policy of the Union and the methods of giving effect to this policy which it embodies in the International Telecommunication Constitution and Convention. The Plenipotentiary Conference also establishes the basis for the ITU budget, the limits on expenditures, and the basis for member country contributions. It also elects member countries to the Administrative Council and the officials of the Union.

[2] Copies of the Resolutions and Recommendations listed in Appendix B will be available in the docket file of this proceeding. The docket file will contain copies of the Final Acts and U.S. delegation reports from HFBC-87, MOB-87 and ORB-88, as well as the Final Acts of the Nice Plenipot. The U.S. delegation report for the Nice Plenipot will be included in the file when it is available.

[3] The Commission has granted licenses or contruction permits for 20 HF broadcasting stations. These stations operate 44 transmitters and broadcast approximately 600 frequency hours per day.

[4] The frequency bands allocated by WARC-79 for HF broadcasting include 9775-9900 kHz, 11650-11700 kHz, 11975-12050 kHz, 13600-13800 kHz, 15450-15600 kHz, 17550-17700 kHz, and 21750-21850 kHz.

[5] *See* Statement No. 45, Final Protocol, HFBC-87.

[6] Frequencies allocated for LMSS include: 1530-1544 MHz, 1555-1559 MHz, 1626.5-1645.5 MHz, 1656.5-1660 MHz. Portions of the 1530-1544 MHz and 1626.5-1645.5 MHz bands are shared on either a co-primary or secondary basis with the maritime mobile-satellite service.

[7] Frequencies allocated for RDSS include: 1610-1626.5 MHz, 2483.5-2500 MHz, 5150-5216 MHz. These allocations are not world-wide, however. Essentially, RDSS allocations in Region 2 are on a co-primary basis, whereas in Regions 1 and 3 they are on a secondary basis. Some co-primary allocations for specific countries were included in footnotes, subject to agreements with affected administrations under Article 14. Similarly, some footnotes were added which circumscribe RDSS operations in certain countries.

[8] *See* Statement No. 58, Final Protocol (MOB-87). The Commission has recently declined to adopt the international allocation for the 1545-1559 MHz and 1646.5-1660.5 MHz bands, and reaffirmed its earlier decision to allocate domestically the bands for the aeronautical mobile-satellite service (AMSS(R)) and other mobile-satellite services (*e.g.*, LMSS). *See* MSS Allocation, General Docket No. 84-1234, 4 FCC Rcd 6016 (1989). This decision has been appealed, *appeal docket, sub nom. Aeronautical Radio, Inc. and Air Transport Association of America v. FCC*, No. 89-1542 (D.C. Cir., September 6, 1989). Pending before the Commission is a petition to reallocate the 1530-1544 MHz and 1626.5-1645.5 MHz bands for LMSS on a shared basis with the maritime mobile-satellite service. *See* Geostar Messaging Corporation, Petition for Rule Making, RM-6459 (June 16, 1988).

[9] *See* Statement Nos. 51 and 52, Final Protocol (MOB-87).

[10] *See* Statement Nos. 50, 90 and 104, Final Protocol (Nice Plenipot).

[11] Frequencies allocated for terrestrial public correspondence with aircraft include 1593-1594 MHz and 1625.5-1626.5 MHz on a primary basis in Region 1 and specified other countries and on a secondary basis in Regions 2 and 3.

[12] The U.S. has supported the decision taken by the International Maritime Organization on the maintenance requirement. *See* Chapter IV, Regulation 15, Maintenance Requirements, Final Text of Amendments to the International Convention for the Safety of Life at Sea 1974 Concerning Radiocommunications for the Global Maritime Distress and Safety System.

[13] The FSS Allotment Plan as adopted by the second session of Space WARC includes the frequencies: 4500-4800 MHz, 6725-7025 MHz, 10.70-10.95 GHz, 11.20-11.45 GHz, 12.75-13.25 GHz.

[14] Due to the considerations for additional spectrum for Advanced Television (ATV) and possible land mobile sharing, the use of UHF broadcast bands for the BSS Sound is not practical.

[15] *See* 86 Stat. 770, as amended, Pub. L. 94-409, § 5(c), September 13, 1976, 90 Stat. 1247, § 3(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-352

In re Applications of

WCVQ, INC.	File No. BPCT-871224KG
NICHOLS BROADCASTING CORPORATION	File No. BPCT-880301KF
MAPLE LEAF BROADCASTING LIMITED PARTNERSHIP	File No. BPCT-880301KG
LAKE CHAMPLAIN COMMUNICATIONS, INC.	File No. BPCT-880301KH
BURLINGTON CHANNEL 44, INC.	File No. BPCT-880301KI
BURLINGTON 44 COMPANY	File No. BPCT-880301KL
DAVID McMEEKIN	File No. BPCT-880301KM

For Construction Permit for a New Television Station on Channel 44, Burlington, Vermont

Appearances

Howard M. Liberman, and *Gerald Stevens - Kittner*, on behalf of WCVQ, Inc.; *Richard J. Bodorff*, *Jonathan W. Emord*, and *Michelle N. Plotkin*, on behalf of Nichols Broadcasting Corporation; *Arthur V. Belendiuk*, and *Gary S. Smithwick*, on behalf of Maple Leaf Broadcasting Limited Partnership; *Barry A. Friedman*, and *Rebecca L. Dorch*, on behalf of Lake Champlain Communications, Inc.; *Robert J. Buenzle*, and *Henry E. Crawford*, on behalf of Burlington Channel 44, Inc.; *R. Clark Wadlow*, *William J. Andrle, Jr.*, and *David E. Worthen*, on behalf of Burlington 44 Company; *John M. Shoreman*, on behalf of David McMeekin; and *Y. Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: December 4, 1989; Released: December 13, 1989

I. Preliminary Statement

1. This proceeding was designated for hearing by *Hearing Designation Order* (DA 88-1061), released August 8, 1988. The issues specified are as follows:

> 1) To determine, with respect to each applicant, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 2) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3) To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. Summary Decision on issue number one has been granted in favor of all applicants. By *Order*, FCC 87M-3582, released October 6, 1988, the standard comparative issue was expanded to include evidence of comparative coverage.

II. Findings of Fact

WCVQ, Inc.

3. WCVQ is a corporation organized under the laws of the State of Vermont. (WCVQ Ex. 1). The corporation has the authority to issue two classes of common stock, with Class A Common Stock having all voting rights and Class B Common Stock having no voting rights.

4. Mr. Christopher McClure owns all of the issued and outstanding shares of WCVQ's Class A (voting) Common Stock, 250 shares, representing a 25% interest in the corporation's total equity. (WCVQ Exs. 1, 4, 5). Mr. McClure is also the corporation's president, as well as one of its directors.

5. The corporation's Class B (non-voting) Common Stock is owned by Mr. Thomas Johnston and The Shaffran Companies, Ltd. Mr. Johnston owns 100 shares representing 10% interest in the corporation's total equity. The Shaffran Companies, Ltd. owns 650 shares, representing a 65% interest in the corporation's total equity.

6. WCVQ was originally a two-stock corporation with the following distribution of equity: Christopher McClure, 25%, voting; CC&E Equities, Ltd., 65%, non-voting; and Mr. Thomas Johnson, 10%, non-voting. On the "B" cut-off date, CC&E Equities withdrew and was replaced by a company known as The Shaffran Companies Ltd. The board of directors of WCVQ is comprised of three persons: Christopher McClure, John F. McGrath, III, and Alan Newman.

7. WCVQ's by-laws provide that all of the powers of the corporation are vested in its board of directors. (Burlington Channel 44 Ex. 5, p. 5). The by-laws also provide that the business and affairs of the corporation are to be managed by its board of directors. WCVQ's

General Manager Mr. McClure selected Mr. McGrath and Mr. Newman for the board of directors because of the skills they would contribute in running the affairs of the station. Newman was chosen because of his financial expertise, and McGrath was selected because of his marketing expertise. (Tr. 139-141).

8. The board of directors will make the corporate decisions for WCVQ. (Tr. 141). According to the by-laws, WCVQ's board takes its actions by majority vote. A quorum for voting purposes is established by any two directors. (Burlington Channel 44 Ex. 5, p. 6; Tr. 147). Thus, as WCVQ is presently constituted, Mr. McClure need not be included in the business decisions of the corporation. Also, McClure can be outvoted on those decisions in which he does participate. (Tr. 147).

9. At his deposition, Mr. McClure testified that in a situation where he was outvoted by his fellow board members, he would "go along" with that contrary decision in accordance with WCVQ's by-laws. (Tr. 149). At the hearing, McClure stated that, in the described circumstance, he would either abide by the majority decision, or he would dismiss his fellow board members, as he has the power to do. (Tr. 148).[1] Mr. McClure further testified at hearing that he intended to freely rely on the financial and marketing expertise of his fellow board members and in most cases will abide by their decisions. (Tr. 151-52).

10. WCVQ, Mr. McClure and WCVQ's officers and directors do not hold any ownership positions in any other media of mass communications. However, Mr. McClure holds a faculty advisor position at noncommercial educational FM broadcast station WWPV, Winooski, Vermont. (WCVQ Ex. 2 at 4, 6). WWPV-FM is a student-run noncommercial radio station licensed to St. Michael's College, where Mr. McClure is an Assistant Professor, and where he teaches courses in broadcast journalism. (WCVQ Ex. 2 at 4). In the event WCVQ's application is granted, Mr. McClure intends to terminate his employment with St. Michael's College and sever all ties with station WWPV. (WCVQ Ex. 2 at 6; Tr. 200-04).

11. Mr. McClure intends to work full-time, at least 40 hours per week, in the management of the Burlington, Vermont TV station as the station's general manager. (WCVQ Ex. 2). He intends to terminate or reduce, as necessary, any conflicting time commitments in order to be able to devote himself on a full-time basis to his duties as general manager of the station.

12. McClure testified at hearing that The Shaffran Companies, Ltd., is committed to loaning WCVQ the funds to finance the prosecution of its application, and to construct and operate the station (Tr. 131-32).[2]

13. Mr. McClure resides at Brown Hill Road East, Hanksville, Vermont, within the predicted city grade contour of WCVQ's proposed station. (WCVQ Ex. 2). He has resided at his current address for the past eleven and one-half years, and intends to remain within the service area if WCVQ's application is granted. Mr. McClure resided within the City of Burlington from May 1971 to June 1977.

14. In June 1987 and in August 1988, Mr. McClure volunteered his time to produce video and voice recordings of hundreds of children as part of an effort by Child-Seekers of Vermont to create child identification records. (WCVQ Ex. 2 at 2).

15. Since January 1988, Mr. McClure has served as Town Moderator for the Town of Huntington, Vermont. (WCVQ Ex. 2 at 2). As Town Moderator, Mr. McClure presided over approximately two all day meetings a year of residents of the community to decide town matters. (Tr. 341).

16. During the spring, summer and fall of 1988, Mr. McClure was a parent volunteer with the Huntington Valley Pony Club. In this capacity, he served as a chaperone on overnight trail rides and performed various other activities for the Club.

17. In 1987, Mr. McClure volunteered his time to the Green Mountain Council, Boy Scouts of America, soliciting contributions from local corporations in an effort to raise funds for the Council. He devoted approximately 30 hours during the year to these activities. (Tr. 341).

18. In both 1985 and 1986, Mr. McClure served one full day as a volunteer on the Vermont Council on the Arts, Media Grants Judging Committee, reviewing audio and video grant submissions and making recommendations of awards to the Vermont Council on the Arts. (Tr. 341).

19. Mr. McClure produced and directed a documentary entitled "Mimi: A Video Essay on Dying," interweaving interviews with death and dying experts from England and the United States. (WCVQ Ex. 2 at 3). This documentary was aired on Vermont Educational Television in February 1982, after which Mr. McClure toured the State of Vermont presenting the documentary to hospice and church groups, including locations within WCVQ's proposed service area. (*Id.*; Tr. 230). The project was funded by the Vermont Council on the Humanities and Public Issues.

20. In 1977, Mr. McClure received a grant from the Vermont Council on Humanities and Public Issues to produce a video documentary entitled "Home Birth . . . The Issues," a study of home birth in Vermont. (WCVQ Ex. 2 at 3; Tr. 208). This documentary was broadcast on Vermont Educational Television. The documentary is currently being used by the University of Vermont School of Medicine, The School of Allied Health Sciences, which is in Burlington, and by various local community groups within WCVQ's proposed service area. (WCVQ Ex. 2 at 3; Tr. 231, 343.

21. Since 1983, Mr. McClure has been an Assistant Professor of Journalism. (WCVQ Ex. 2 at 4). He is also the faculty advisor to WWPV, Winooski, a student-run noncommercial educational radio station.

22. In 1983 and 1984, Mr. McClure worked for ESPN, first as a freelance videographer in Krankskagora, Yugoslavia and Schladming, Austria, covering World Cup ski races, and then in Sarejevo, Yugoslavia, providing nightly footage of the Winter Olympic Games. (WCVQ Ex. 2 at 4).

23. For six months in 1981, Mr. McClure produced and directed news programming for WEZF(TV), (now WVNY), the ABC affiliate in Burlington, Vermont. Mr. McClure worked 36 hours per week in this capacity.

24. In either 1978 or 1979, Mr. McClure produced, directed and edited a one-hour documentary entitled "The Governors," a discussion by the then current and six former governors of Vermont about the changes they experienced in the State of Vermont. This documentary

was commissioned by the Vermont Council on the Humanities and Public Issues specifically to be broadcast on Vermont Educational Television. (Tr. 223).

25. In 1977, Mr. McClure produced a documentary entitled "By Force and Against Her Will: A Study of Rape" for the University of Vermont.

26. From 1971 to 1976, Mr. McClure was involved on a full-time basis in the construction, design and administration of a television studio facility for the University of Vermont.

27. From 1967 to 1970, Mr. McClure was a full-time employee of the University of Illinois, where he served as a producer and director for the University's instructional television facility in Champain/Urbana, Illinois.

28. From March 1966 to July 1967, Mr. McClure worked full-time in Pago Pago, American Samoa as crew chief for four operating studios for the American Samoa Television Project. (WCVQ Ex. 2 at 5). Mr. McClure was involved in the production of over 200 instructional programs a week, as well as public service and entertainment programs, which were broadcast over six television channels.

29. From April 1962 to July 1962, Mr. McClure was a full-time disc jockey for WGSB, St. Charles, Illinois.

30. Mr. McClure received a Bachelor of Science in Speech degree from Emerson College, Boston, Massachusetts, in 1966. (WCVQ Ex. 2 at 6). His major was Radio and Television. While in college, Mr. McClure served for two summers as a scholarship engineer and announcer for the college's noncommercial FM station, WERS, Boston, Massachusetts. Mr. McClure also was active as a staff announcer throughout his college years with WECB, the college's carrier current AM station.

Nichols Broadcasting Corporation

31. Nichols is a Vermont corporation. John C. Nichols is the president, treasurer, sole director, and sole shareholder of Nichols, possessing 100 shares of voting stock. (Nichols Ex. 1).

32. Nichols proposes to integrate Mr. Nichols into station management and operation on a full-time (40 or more hours per week) basis as the station's general manager. (Nichols Ex. 2 at 1; Tr. 388-89). Mr. Nichols pledges to sever all ties he has with any business in which he has an interest or in which he is employed in order to fulfill his full-time integration commitment. (Nichols Ex. 2 at 1). As general manager, Mr. Nichols will create all policies governing station management and operation. He will supervise all station departments and department managers. He will have exclusive authority to hire and fire all station personnel.

33. Mr. Nichols has lived in Burlington, Vermont, since July 1988 (Tr. 352, 431). He has resided within the primary service area contour since 1972, and will continue residing in Burlington, Vermont. (Nichols Ex. 2 at 2; Tr. 354, 431-432). From 1972 to 1988, he resided variously in Barre, Vermont; Burlington, Vermont; South Burlington, Vermont; Winooski, Vermont; and Colchester, Vermont -- all within the primary service contour area of the proposed television station. (Nichols Ex. 2 at 2).

34. From 1978 to 1983, Mr. Nichols served as a member of the Board of Directors of the Multiple Sclerosis Society (Northern Vermont Chapter). He also served as the Master of Ceremonies for the Multiple Sclerosis Society's 40-hour dance marathon each year from 1975 to 1986.

35. In June 1986, Mr. Nichols served as the lead host of the March of Dimes Telethon against birth defects on WVNY-TV (Channel 22), Burlington, Vermont. (Nichols Ex. 2 at 3). Mr. Nichols was also involved in organizing the telethon. (Tr. 397). In January 1987, he served as a co-host of the March of Dimes Bid for Bachelors. In November of 1988, he hosted the third annual Bid for Bachelors. (Nichols Ex. 2 at 3). Mr. Nichols was responsible for organizing both Bid for Bachelors events. (Tr. 398).

36. In service to the American Cancer Society, during the summers of 1985 and 1986, Mr. Nichols provided free music entertainment for participants at Camp Ta-Kum-Ta, a summer camp for children with cancer. During the winters of 1985 and 1986, he provided free music entertainment for the counselors and management of Camp Ta-Kum-Ta, and in the summer of 1987, he co-hosted a free dance aboard the "Spirit of Ethan Allen" tour ship on Lake Champlain for children with cancer. (Nichols Ex. 2 at 3-4).

37. In June of 1987, Mr. Nichols provided a benefit fundraising dance for Howard Mental Health Services, a community mental health organization in Burlington, Vermont.

38. In June of 1988, Mr. Nichols was an on-air personality in television public service announcements for the American Red Cross to help generate volunteers for a Red Cross blood drawing.

39. In March of 1981, Mr. Nichols was an on-air personality in television public service announcements for the winter Vermont Special Olympics at Smugglers Notch ski area and in Stowe, Vermont.

40. Since 1985, Mr. Nichols has been a member of the Vermont AD Club, a professional organization formed, in part, to gather media professionals to allow for the exchange of information. (Nichols Ex. 2 at 4; Tr. 394-95).

41. In the summer of 1969, Mr. Nichols was a clerical assistant to the Chief of Network Operations for the ABC TV Network in New York City. In the summer of 1970, Mr. Nichols served as the co-producer, co-writer and co-anchor of "70," a youth oriented news program aired on KOCO-TV, Oklahoma City, Oklahoma. From September 1970 to March 1971, Mr. Nichols was an editorial and production assistant to the United States Correspondent of the British Broadcasting Corporation in New York City. From March 1971 to March 1972, he was the traffic supervisor for the British Broadcasting Corporation in New York City. From November 1972 to May 1973, Mr. Nichols was a sales representative for WSNO-FM, Barre, Vermont (located within the primary service contour area proposed to be served by Nichols Broadcasting). (Nichols Ex. 2 at 5).

42. From May 1973 to October 1982, Mr. Nichols was employed by Vermont Broadcasting Corporation, licensee of WJOY-AM and WQCR-FM, Burlington, Vermont in various capacities, including staff announcer, sales representative, program director and sales manager. From May 1973 to May 1974, Mr. Nichols served as sales representative at WQCR. From January 1978 to approximately August 1982, Mr. Nichols served as sales manager at WQCR. (Nichols Ex. 2 at 5).

43. From 1977 to 1986, Mr. Nichols was the owner and operator of the Music Machine mobile disc jockey service and worked part-time, providing dance music entertainment.

44. From November 1984 to July 1986, Mr. Nichols was part-owner of Champlain Valley Broadcasting Corporation, licensee of WXXX-FM, South Burlington, Vermont. The licensee of the station was an entity formed by the merger of three competing hearing applicants who settled in advance of an initial decision in the case (Tr. 365, 453-455). As a part of his contract to work at the station, Mr. Nichols agreed to serve as sales and general manager of the station. (Tr. 384). Mr. Nichols served in these dual capacities until April 1985.

45. Mr. Nichols owns a broadcast consulting business which is being dissolved. (Nichols Ex. 2 at 5-6). The business operated from approximately June of 1987 until June of 1988. (Tr. 430).

46. Mr. Nichols owns no interest in any medium of mass communication. John C. Nichols, sole voting principal in Nichols, has pledged to sever all connections he has with his broadcast consulting business if Nichols is awarded a construction permit. (Nichols Ex. 3 at 1).

Maple Leaf Broadcasting Limited Partnership

47. Maple Leaf is a limited partnership organized under the laws of the State of Vermont. (Maple Leaf Ex. 1). Thomas Ho is the sole general partner of Maple Leaf with a 32% ownership equity interest. He has 100% voting responsibility in the affairs of Maple Leaf. There are four limited partners in Maple Leaf: Peter Lau, Shu Ming Chu, William L. Busch, and Alex Ho. Each holds a 17% ownership interest. Maple Leaf certified in FCC Form 301 that no limited partner will be involved in any material respect in the management or operation of the proposed station.

48. Neither Maple Leaf nor its sole general partner, Thomas Ho, has any ownership interest in or management position with any other medium of mass communications. (Maple Leaf Ex. 3).

49. Maple Leaf proposes to integrate its sole general partner, Thomas Ho, into the management of Maple Leaf's proposed station as general manager. (Maple Leaf Ex. 2 at 1; Tr. 544-45). His duties will include overall management of station operations and personnel; management of the station's financial affairs; the formulation of station policy; and ensuring compliance with FCC rules and policies. (Maple Leaf Ex. 2).

50. Mr. Ho is a male of Asian (Chinese) descent. (Maple Leaf Ex. 2 at 1). If Maple Leaf's application is granted, Mr. Ho promises to move to Burlington, Vermont and terminate such activities as may be necessary for him to fulfill his integration commitment (Tr. 543-45).

Lake Champlain Communications, Inc.

51. Lake Champlain Communications, Inc. ("LCC") is a single class stock corporation incorporated under the laws of the State of Vermont. (LCC Ex. 1). The corporation has issued 200 shares of stock. The officers, directors and shareholders of LCC are as follows:

Name and Residence Address	Official Position	Shares	Percent
Christina D. Smullen 4 Sebring Road South Burlington, Vermont	President, Treasurer, Director	100	50%
Ruth Ellen DesLauriers 3608 No. Pine Grove, #3-M Chicago, Illinois	Vice President, Director	70	35%
Edward Paul DesLauriers 173 Loomis Street Burlington, Vermont	Secretary, Director	30	15%
Sarah Field P.O. Box 495 Montpelier, Vermont.	Assistant Secretary	0	0%

52. As of the filing of the application, Edward DesLauriers was neither an officer nor director of the corporation. (Tr. 577, 581-82, 766, 776). He first became an officer and director of the corporation on November 29, 1988. (Tr. 766, 776; Maple Leaf Exs. 8, 10).

53. Neither Lake Champlain, nor any of its shareholders, officers or directors, hold any interest in any media of mass communications. (LCC Ex. 2).

54. LCC proposes to integrate into the management and day-to-day operation of its proposed station its three shareholders, Christina D. Smullen, Ruth E. DesLauriers, and Edward P. DesLauriers. (LCC Ex. 3).

55. Christina D. Smullen will serve as the general manager of the proposed station, working at the station on a full-time basis of at least 40 hours per week (LCC Ex. 3). As the general manager, she will oversee the activities of all station departments, supervise personnel including other managers and department heads, and be responsible for hiring and firing of managers. She will also be responsible for day-to-day operations of the station, and overseeing all decisions in the areas of programming, promotion, technical operations, sales, equal employment opportunity matters, and business affairs.

56. Ms. Smullen is an Hispanic female. (LCC Ex. 4; Tr. 644). She was born in Burlington, Vermont, in 1957 and is an American citizen. (LCC Ex. 4). Her mother is Hispanic. (*Id.* ; Tr. 649, 651). Her mother was born and raised in Guadalajara, Mexico, and was a Mexican citizen. (Tr. 622). Ms. Smullen lived in Mexico from January of 1970 until June of 1972, between the ages of 12 and 15. (LCC Ex. 4). She is fluent in Spanish.

57. With the exception of the three years she lived in Mexico as an adolescent, Ms. Smullen has lived in the Burlington area, within the predicted city grade coverage contour of the proposed station, all of her life. (LCC Ex. 4). She lived within the city limits of Burlington in 1979 and then again from the fall of 1982 until the fall of 1984. (Tr. 641). She has resided in South Burlington, Vermont since June of 1988. (LCC Ex. 4). South Burlington is an adjacent suburb of Burlington. She intends to maintain her current residence if the construction permit is awarded to LCC.

58. Since September 1988, Ms. Smullen has been on the Personnel Committee of the Children's School, a preschool in South Burlington, where she spends between two and ten hours per month engaged in the hiring, firing and semi-annual evaluations of the school's teachers. (LCC Ex. 4 at 2).

59. Over the past four years, Ms. Smullen has volunterred time to assist charities in carrying out three or four fundraising events. (LCC Ex. 4 at 2). Each year, she has assisted in the management of logistics for the three or four fundraising events benefiting Women Helping Battered Women, the Ronald McDonald House, and the Kidney Association. Ms. Smullen estimates she has devoted approximately two to three days per year per charitable event. Her assistance with these charities has been "[t]hrough the Quarry Hill Tennis & Swim Club, located in South Burlington, Vermont." (*Id.*) Ms. Smullen is a 20% owner, as well as an officer and director of the Quarry Hill Tennis & Swim Club. (Tr. 570).

60. For the past ten years, Ms. Smullen has assisted the Champlain Valley Swim League with summer swim meets. (LCC Ex. 4 at 3). These meets are held at the Quarry Hill Tennis & Swim Club and elsewhere in the Burlington area. The League is area-wide, and is not limited in membership to just the Quarry Hill Club. (Tr. 565-66). Ms. Smullen was also involved in the establishment of the Champlain Valley Junior Tennis League in the early 1980's. (LCC Ex. 4 at 3). Ms. Smullen has been a member of the Lake Champlain Chamber of Commerce for approximately ten years. She was a volunteer with the Waterbury Project, which organized and held four parties between 1974 and 1975 for mental health out-patients at the Waterbury Hospital in Waterbury, Vermont. (LCC Ex. 4 at 3).

61. Ruth E. DesLauriers, vice president, director and 35% shareholder of LCC, will serve as program director of the proposed station, working at the station on a full-time basis of at least 40 hours per week. (LCC Ex. 3) As the program director, she will supervise the selection and placement of all programming to be broadcast.

62. Ms. DesLauriers is an Hispanic female. (LCC Ex. 5; Tr. 734). She was born in Burlington, Vermont in 1962, and is an American citizen. (LCC Ex. 5). Her mother is Hispanic. Her mother was born and raised in Guadalajara, Mexico. (Tr. 744). Ms. DesLauriers lived in Mexico from January of 1970 until June of 1972 and then again from January of 1978 until June of 1979. (LCC Ex. 5). She is fluent in Spanish.

63. With the exception of the years she lived in Mexico, Ms. DesLauriers lived in the Burlington area, within the predicted city grade coverage contour of LCC's proposed station from 1962 until October 1985. (LCC Ex. 5; Tr. 671, 751-52). She currently resides in Chicago. (LCC Ex. 5; Tr. 671). Ms. DesLauriers has promised to move back to the Burlington area and will reside in the City of Burlington if the LCC application is granted. (LCC Ex. 5).

64. Ms. DesLauriers is currently employed full-time by Peat Marwick in Chicago as sales/marketing manager for the Executive Education Center. (LCC Ex. 5) Prior to her current position, she worked for Personnel Pool, Inc., a personnel placement company, for two years. She was hired in June of 1986 as a coordinator, was promoted to sales representative, and was further promoted to inside operations manager, a position she held until she left for Peat Marwick in June of 1988. From October of 1985 until August of 1986, Ms. DesLauriers worked for the Chicago Hilton and Towers as the assistant manager to the director in charge of meeting and conference room setup. Prior to moving to Chicago in October of 1985, she worked full-time at Bolton Valley Ski Resort from January to April 1985, and at the Quarry Hill Tennis & Swim Club from May to September 1985. Every summer between 1975 and 1985 she worked at the Quarry Hill Tennis and Swim Club. She also worked weekends in the fall and winter between 1975 and 1985 at the Bolton Valley Ski Resort. While attending college full-time, she also worked part-time from the fall of 1983 through the spring of 1985 as a staffing coordinator for the Medical Center Hospital in Burlington, Vermont.

65. Ruth DesLauriers seeks civic enhancement credit for involvement in 1985 in supporting two or three different charitable organizations which held fundraisers through the Quarry Hill Tennis & Swim Club. She has a 20% ownership interest in the Quarry Hill Tennis & Swim Club. (Tr. 739, 762). She spent a total of three days, eight hours a day, in the summer of 1985 assisting these charities. (Tr. 746).

66. Edward P. DesLauriers, secretary, director and a 15% shareholder of LCC, will serve as the sales manager of the proposed station, working on a full-time basis of at least 40 hours per week. (LCC Ex. 3). As the sales manager, he will set the station's policies for the sale of commercial advertising time, supervise the members of the sales department, and select and supervise the relationship with the station's independent representation company. (*Id.*)

67. Mr. DesLauriers is a male American citizen of Hispanic descent. (LCC Ex. 6). His mother was born and raised in Mexico. Mr. DesLauriers lived in Mexico from January of 1970 until June of 1972 and then again from December of 1977 until July of 1981. He is fluent in Spanish.

68. Mr. DesLauriers currently resides in Burlington, Vermont. (LCC Ex. 6). He has lived at several residences in Burlington over the past year. With the exception of the above and the years he lived in Mexico, Mr. DesLauriers has otherwise resided at the DesLauriers family home in South Burlington. The family home is well within the predicted coverage contour of the proposed station.

69. Edward DesLauriers has also assisted in various charities and fundraisers at the Quarry Hill Tennis & Swim Club. (LCC Ex. 6 at 1-2). Edward DesLauriers has a 20% ownership interest in the Quarry Hill Tennis & Swim Club. (Tr. 762). He spent two or three days per year over the past four years on these activities. (LCC Ex. 6 at 2).

70. He assisted with twice weekly swim meets for the Champlain Valley Swim League over the past four years and assisted with annual championship meets. In 1983, he swam in the Muscular Distrophy Association swimathon held in Essex Junction, a suburb of Burlington. He has been involved in the Vermont Student Environment Policy since its inception in November 1988. He also was a volunteer for the National Ski Patrol at Bolton Valley, Vermont, one day a week during the winter of 1988. Edward DesLauriers has a 5% ownership interest in the Bolton Valley Ski Resort. (Tr. 761). Edward DesLauriers has also been a volunteer emergency medical technician at the Dover Hospital in Dover, New Hampshire. (LCC Ex. 6 at 2).

71. Christina Smullen, Ruth DesLauriers and Edward DesLauriers are siblings. They first learned of the availability of Channel 44 over the Christmas holiday in 1987, from their father, Ralph DesLauriers. (Tr. 573-74, 675, 722-23). During the course of the following few weeks, at

various times the three discussed the idea of applying for the construction permit, the structure of the prospective business, the roles and responsibilities each would undertake for preparing the application, overseeing and coordinating the prosecution of the application, and ultimately, the management and operation of the station. (Tr. 575-77, 581-83, 617-19, 675-76, 684, 718, 765, 783).

72. In January and February 1988, the three discussed the project and determined to go forward. (Tr. 576, 619, 676, 718). Also determined at that time were the percentages of ownership each would take in the corporation. (Tr. 581, 685). Christina Smullen was selected, by consensus, to hold a 50% interest, and to be in charge of essentially all of the day-to-day matters pertaining to the preparation and prosecution of the application. (Tr. 581, 676). This decision was based upon the facts that Christina Smullen had the most business experience and was going to be "handling all the leg work" in preparing the application. Ruth DesLauriers was living in Chicago and could not oversee these matters, and Edward DesLauriers was young, lacking in business experience, and a student in school. (Tr. 577).

73. Ms. Smullen was in charge of all aspects of the preparation and prosecution of the application. Ruth DesLauriers testified that, "I didn't work a lot on this, and I went along with what she said as far as the attorneys and that sort of thing." (Tr. 689). Edward DesLauriers testified that Ms. Smullen has essentially handled everything in connection with the application. (Tr. 768).

74. Christina Smullen oversaw all matters necessary for the filing of the application, including the preparation and filing of a Certificate of Incorporation and Articles of Incorporation with the State of Vermont; obtaining reasonable assurance of a transmitter site; coordinating with the applicant's engineer and counsel; preparation of a budget for the prosecution, construction and initial operation of the proposed station; and obtaining a bank letter providing the applicant with the requisite assurance of the availability of funds for the construction and initial operation of the station. (Tr. 578-79, 609-11, 627, 636-37, 649, 646-47, 677, 681, 687-89, 710, 713-14, 716, 765, 808; Maple Leaf Ex. 5; Nichols Ex. 5).

75. At the time the Lake Champlain application was filed, Edward DesLauriers was 20 years old. (Tr. 760). He is presently a full-time student seeking admission to the environmental studies program at the University of Vermont. (Tr. 760-61).

76. After he had been informally consulted about the matter by his fellow shareholders, Edward DesLauriers was elected secretary of the corporation at a meeting attended by Ms. Smullen, Edward DesLauriers and Sarah Field, held on November 29, 1988. (Tr. 581-82, 590-91).

77. Ms. Smullen prepared Lake Champlain's application largely independent of her fellow stockholders. (Tr. 617, 713-14, 795-97). Neither Ruth DesLauriers nor Edward DesLauriers reviewed the application before it was filed. (Tr. 617, 713, 795). The first time Edward DesLauriers saw the application was at the end of November 1988. (Tr. 797). Ruth DesLauriers does not recall when she first saw the application, but only that she saw it after it was filed. (Tr. 713).

78. In order to finance the costs of preparing, filing and prosecuting the application, the shareholders of Lake Champlain have borrowed money from their father, Ralph DesLauriers. (Tr. 593). Ruth DesLauriers has paid nothing in addition to the $70 she paid for her shares of stock. (Tr. 708-09). Edward DesLauriers has not contributed any funds other than the $30 he paid for his shares of stock. (Tr. 785).

79. Ms. Smullen has paid some bills for legal and engineering work, as well as other bills, from her personal funds. (Tr. 602). The decision to start paying bills out of her personal funds was made by Ms. Smullen alone, without consultation with her fellow shareholders. (Tr. 611-12). She has not discussed with her fellow shareholders whether her personal contributions are in the form of a loan or capital contributions, or what the terms of repayment are if the contributions are considered as loans. (Tr. 613).

80. Neither Ruth DesLauriers nor Edward DesLauriers has seen any bills in connection with the application and they do not know how much money has been spent to date in connection with the application. (Tr. 689, 691, 786). Edward DesLauriers was under the mistaken impression that no one other than his father had contributed funds to the corporation. (Tr. 786).

81. Although the shareholders of Lake Champlain consider the money advanced by their father a loan to the corporation, there are no written documents governing the terms of the loan, nor have repayment terms been discussed. (Tr. 594-95). Ruth DesLauriers does not know how much money her father has loaned to the corporation. (Tr. 691). She does not know whether she is personally liable. (Tr. 711). She also does not know whether the funds advanced by Ms. Smullen are in the form of a capital contribution to the corporation or a loan. (Tr. 712).

82. Ms. Smullen is the only person authorized to sign checks on Lake Champlain's bank account. (Tr. 595). Neither Ruth DesLauriers nor Edward DesLauriers is a signator. (*Id.*)

Burlington Channel 44, Inc.

83. Burlington Channel 44, Inc. is a corporation organized under the laws of the State of New York. There are 5,100 shares of common voting stock and 4,900 shares of preferred non-voting stock in Burlington Channel 44, Inc. Mr. Randy Daniels, who is president, secretary, treasurer and sole director of Burlington Channel 44, Inc., possesses or subscribes to all 5,100 shares of common voting stock of the Corporation. Messrs. Lee Payne and Adam Clayton Powell, Jr. subscribe to 100 shares and 2,400 shares, respectively, of the preferred non-voting stock. The remaining 2,400 shares of non-voting stock are presently unissued. (Burlington Channel 44 Ex. 1).

84. Randy Daniels is a black American and a resident of the City of New York. He is sole voting stockholder of the applicant and proposes to be integrated full-time as the general manager of the station. (Burlington Channel 44, Ex. 1; Ex. 2; Tr. 1003). In the event Burlington Channel 44's application is granted, Mr. Daniels will move to Burlington, Vermont. (Burlington Channel 44 Ex. 3).

85. Mr. Daniels' duties as the general manager will be those of top management, with him having sole responsibility for selecting, hiring and terminating staff at the station. Mr. Daniels' responsibilities will also include selecting programming, ascertaining and responding to com-

munity needs, concerns, and problems, approving budgets, and all other management and operating procedures at the station. (Burlington Channel 44, Inc. Ex. 2).

86. Mr. Daniels is currently employed by Caroline Jones Advertising, Inc. in New York as Director of International Affairs and is currently on assignment in Nassau, Bahamas. (Burlington Channel 44 Ex. 2 at 1; Ex. 3 at 2). He serves as adviser to the Government of the Bahamas on Public Affairs and Broadcasting. (Burlington Channel 44 Ex. 3 at 2).

87. Mr. Daniels' employment contract with Caroline Jones Advertising is for a period of three years, expiring on August 31, 1991, and employs Daniels on a full-time basis. (McMeekin Ex. 6 at 1). In addition to his primary responsibility to open a company office in the Bahamas, the company reserves the right to call upon him for other company business. His compensation under the contract includes a salary of at least $100,000. (*Id.* at 2). The written employment agreement contains no provision for Mr. Daniels to unilaterally terminate his agreement. (*Id.* at 3). Only his employer has the right to unilaterally cancel the agreement. (*Id.*) Otherwise, the contract indicates that it may not be amended, modified or discharged except by the parties' mutual written consent. (*Id.* at 4).

88. Mr. Daniels testified that he has an oral understanding, but no written agreement with Caroline Jones that he will cease employment with her agency, terminate his employment contract, and move to Burlington, Vermont if the application of Burlington Channel 44 is granted. Specifically, the testimony is as follows:

> A. I told her when I took the job that I had a pending application before the FCC for a license to construct a television station in Burlington, Vermont and if that license were granted I would have to terminate this contract. I also told her that I thought the length of the prosecution would be such that it probably [would] not conflict with this contract, but if a conflict ever arose, my first priority was Burlington, Vermont; that I would move there to operate the station.
>
> Q. In your integration statement in this case, you indicated a direct commitment that you would work full-time at the station if and when you received the license, as General Manager. Do you have any qualification on that whatsoever?
>
> A. Absolutely none. I fully intend to work as general manager of the station. (Tr. 1025).

89. It was in 1971 that Mr. Daniels commenced his career in television (and radio) broadcasting. At that time Daniels was attending Southern Illinois University in a degree program leading to a Bachelor of Science Degree in Radio-Television and Government which was awarded to him upon completion of those studies. (Burlington Channel 44 Ex. 3; Tr. 1018).

90. While attending college, Daniels worked for two and a half to three years at WSIU-FM and for one school year (September 1971 through May 1972) at WSIU-TV. (Tr. 1017). While at college Daniels worked in the radio and television stations both on an unpaid basis as part of his degree requirements, and also as a salaried producer for both the radio and television stations as well as the Southern Illinois University radio network. (Burlington Channel 44 Ex. 3; Tr. 1019-10).

91. While at Southern Illinois University, Daniels worked on preparation of a daily television newscast, one-half hour in the evening and one-half hour at night and also produced a one-hour program dedicated to the black community on a monthly basis. (Tr. 1017). He devoted approximately eight hours per week to that work and when working at the radio station he devoted approximately 15 hours per week there. (Tr. 1018).

92. Following graduation from college, Mr. Daniels accepted employment with CBS News and worked in various capacities for that organization for over ten years in both radio and television. He started as a copy boy and then was promoted to reporter. He was subsequently promoted to national correspondent assigned to CBS News Headquarters in New York, then to foreign correspondent, and finally promoted to the position of bureau chief. (Tr. 989-90).

93. He set up the first CBS News Africa Bureau in Nairobi, Kenya in 1977, and managed it for three years as its bureau chief with responsibility for coverage of all of sub-Sahara Africa. During this time, Mr. Daniels originated the first satellite television transmissions from Nigeria, Kenya, Sudan, and Uganda. He also broadcast live from Iran on numerous occasions during the Iran Revolution and broke the news of the initial release of the first 13 hostages held by Iran. (Burlington Channel 44, Inc. Ex. 3; Tr. 990).

94. In 1982, Mr. Daniels founded Jacaranda International and served as its managing director responsible for hiring over 40 American experts in implementing an extensive consulting contract with the Nigerian Television Authority for training and staff development in ten state-owned television stations involving over 1,000 Nigerian broadcasters and technicians. (Burlington Channel 44, Inc. Ex. 3).

95. Mr. Daniels has been a consultant to the Mayor of the City of Atlanta on cable television and supervised the development of the Public Access Channel. In his present position with Caroline Jones Advertising, Inc., he serves in the position of director of international affairs and in that capacity serves as adviser to the Government of the Bahamas on Public Affairs and Broadcasting. (Burlington Channel 44 Ex. 3).

96. Mr. Daniels is a member of the National Association of Black Journalists and a past member of the Minority Business Defense Fund. He is also a member, supporter and contributor to the Urban League (New York Chapter) and the NAACP (New York Chapter).

97. Randy Daniels has no existing mass media interests nor anticipated future interests nor does any other stockholder of Burlington Channel 44, Inc. have any other such broadcast or media interests. (Burlington Channel 44 Ex. 4).

Burlington 44 Company

98. Burlington 44 Company is a two-class stock corporation organized under the laws of the State of Vermont. (Burlington 44 Ex. 1). The Articles of Association of Burlington 44 Company authorize 25,000 shares of common (voting) stock and 100,000 shares of preferred (non-voting) stock both at $.01 par value. (Burlington 44

Company Ex. 1) Ms. Frances Bastian Seguin possesses all shares of common stock that have been issued by the corporation representing 20% of the equity. (Burlington 44 Company Ex. 1; Tr. 866). She paid $100 as total consideration for her shares. (Nichols Ex. 7). The corporation has issued 300 shares of preferred, non-voting stock. (Burlington 44 Company Ex. 1). The preferred stock, representing 80% of the equity in Burlington 44, is held as follows: 100 shares by Mr. John J. Easton, for which he paid total consideration of $6,666; 100 shares by Ms. Teresa Reisdorf, for which she paid total consideration of $6,666; and 100 shares by Mr. John F. Chapple, III, for which he paid total consideration of $6,666. (Nichols Ex. 7; Tr. 866).

99. Burlington 44 proposes to integrate Ms. Seguin, its president treasurer, chairman of the board and sole owner of voting (common) stock, into the day-to-day management of the station. Ms. Seguin will serve as general manager of the station, working 40 hours or more per week. Ms. Seguin will have overall responsibility for all aspects of the operation of the station, including administrative, personnel, programming, sales, budgeting, community relations and news. (Burlington 44 Company Ex. 2).

100. Ms. Seguin is presently employed as a lobbyist with Associated Industries of Vermont, In Montpelier, Vermont. (Tr. 930). She is a female, and a resident of Burlington, Vermont, since September of 1982.

101. Ms. Seguin was employed as a copywriter for WSYB(AM)/WRUT(FM), Rutland, Vermont from September 1975 through June 1977. (Burlington 44 Company Ex. 3). As a copywriter, she wrote the radio advertising copy for both stations and did the traffic for WRUT(FM). (Tr. 927). She produced some commercials and worked with the station's salespersons and clients on promotional campaigns. (Tr. 928).

102. From April 1978 through October 1980, Ms. Seguin worked as assistant news director at WDEV(AM), Waterbury, Connecticut. (Burlington 44 Company Ex. 3). As assistant news director, she collected, wrote and edited stories on state, local and national news, and anchored the daytime newscasts. (Tr. 928). She also produced radio commercials. (Tr. 929).

103. In October 1980, Ms. Seguin accepted an offer to work at WVMT(AM), Burlington, Vermont. (Tr. 929). She was later promoted to news director. (Tr. 929). Ms. Seguin also anchored newscasts and wrote and produced radio advertising. (Burlington 44 Company Ex. 3). In addition to her full-time responsibilities at WVMT(AM), Ms. Seguin was also employed as a free lance correspondent for the *Rutland Herald* newspaper in Rutland, Vermont. (Burlington 44 Company Ex. 3). Ms. Seguin worked at WVMT(AM) until April 1984. (Burlington 44 Company Ex. 3).

104. From May 1984 to November 1984, Ms. Seguin was employed full-time as press secretary for Mr. Easton in his campaign for Governor of Vermont. (Burlington 44 Company Ex. 3).

105. Burlington 44, and its officers, directors and shareholders have no interests in any other medium of mass communications. (Burlington 44 Company Ex. 4). Ms. Seguin's husband is chief engineer for AM broadcast station WVMT, Colchester, Vermont, a community adjacent to Burlington. (Tr. 849-50).

106. The directors of Burlington 44 are Ms. Seguin, Mr. Norman James and Ms. Laurel F. Butler. (Burlington 44 Company Ex. 1). The officers of Burlington 44 are Ms. Seguin as president and treasurer, Ms. Butler as vice president, and Mr. James as secretary. (Burlington 44 Company Ex. 1).

107. Ms. Seguin first learned of the availability of the Burlington channel when she was contacted by Mr. Easton on February 19, 1988. (Tr. 850). In conversation with Ms. Seguin, Mr. Easton explained to her how the channel had been allocated for Burlington, and how the FCC comparative process works. (Tr. 855). He told Ms. Seguin that this was an opportunity that she should take advantage of, and asked her if she would be interested in applying for the allocation and working as general manager of the station. (Tr. 855). Ms. Seguin was told by Mr. Easton that he chose to approach her about the allocation because she had worked for him in his 1984 campaign for Governor of the State of Vermont, that he had confidence in her, he respected her abilities, and because she had broadcasting experience. (Tr. 856). Mr. Easton told her that as an applicant she could receive a preference over other applicants because of her broadcast experience, her female status, and her local residence. (*Id.*)

108. The other shareholders, Mr. Chapple and Ms. Reisdorf, were also initially contacted by Mr. Easton (Tr. 853-54). Mr. Chapple and Mr. Easton were friends prior to the time that Mr. Easton solicited Mr. Chapple to be a principal in the applicant. (Tr. 854). Ms. Seguin was familiar with Mr. Chapple, but she did not know Ms. Reisdorf at all. (Tr. 853-84). She never spoke to either of them about the application before the application was filed (Tr. 881).

109. On February 26, 1988, Ms. Seguin decided to become a participant in the application process. (Tr.,884). The lawyer representing Burlington 44 at that time was Mr. Clark Wadlow. Ms. Seguin first obtained the name of Clark Wadlow, her legal counsel, from Mr. Easton. (Tr. 852). Prior to February 26, 1988, Ms. Seguin had never communicated with Mr. Wadlow or anyone at his firm about the application. (Tr. 885). Mr. Easton had discussed the application with Mr. Wadlow and had arranged for Mr. Wadlow to be available to handle Burlington 44's application before Mr. Easton's initial contact with Ms. Seguin. However, it was Ms. Seguin who formally retained Mr. Wadlow. (Tr. 858).

110. Ms. Seguin first saw the engineering statement that Mr. Andrus prepared on February 29, 1988, the day before the filing deadline. (Tr. 870). The engineering portion of the application signed by Mr. Andrus is dated February 25, 1988, one day prior to the day that Ms. Seguin decided to become a participant in the application. (Tr. 885). The first time that Ms. Seguin ever saw Mr. Andrus' name in writing was when she reviewed the engineering statement that he had prepared for Burlington 44. (Tr. 870). Ms. Seguin believes that Mr. Wadlow and Mr. Andrus worked together to complete the engineering portion of Burlington 44's application. (Tr. 859).

111. When Mr. Easton initially contacted Ms. Seguin on February 19, 1988, he had already selected a site owned by Mr. Harvey Farr for Burlington 44's transmitter. (Tr. 859). Ms. Seguin and Mr. Easton drove to White River Junction, Vermont to meet with Mr. Farr, the site owner.

(Tr. 914). At their meeting, Mr. Farr signed a letter thereby agreeing to lease his site to Burlington 44. (Tr. 916).

112. Mr. Easton suggested to Ms. Seguin that she contact a bank for financing and gave her a list of three banks from which to choose. (Tr. 868). The same day that she decided to become a participant in the application, February 26, 1988, Ms. Seguin contacted Mr. William George, the president of Vermont National Bank, the first bank on Mr. Easton's list. (Tr. 868). Ms. Seguin phoned Mr. George and told him her name and that Burlington 44 was applying for a license to operate a TV station in Burlington. (Tr. 869). She explained to him that she needed a letter of commitment from a bank. (Tr. 869). She described to him the form letter that had been provided by the corporation's attorney, Mr. Wadlow. (Tr. 869). From her office, she telefaxed to Mr. George the form letter, and they discussed its contents over the phone. (Tr. 869). He had it typed at the bank, and he signed it. (Tr. 869).

113. The Articles of Association for Burlington 44 were prepared by Mr. Easton and filed by him with the Secretary of State in Montpelier, Vermont. (Tr. 871, 917). Ms. Seguin believes that Mr. Easton paid the $35 filing fee. (Tr. 918). Ms. Seguin never received a bill for legal services rendered for Burlington 44 by Mr. Easton from him or his law firm Miller, Eagleston and Rosenberg. (Tr. 902).

114. The decision on the percentage of stock held by preferred stockholders was arrived at by "mutual agreement." (Tr. 902). Mr. Easton worked out the agreement with the preferred stockholders. (Tr. 902). Ms. Seguin never spoke directly to Mr. Chapple or Ms. Reisdorf about the number of shares that they would purchase. (Tr. 902). In fact, Ms. Seguin did not meet or speak with Mr. Chapple or Ms. Reisdorf at all until June 7, 1988. (Tr. 902).

115. The first meeting of shareholders for Burlington 44 was held on June 7, 1988. (Tr. 876). Mr. Wadlow, Ms. Seguin, Mr. Easton, Mr. Chapple, and Mr. Ed Reisdorf, Teresa Reisdorf's husband, attended the meeting. (Tr. 876). Mr. Easton presented drafts of corporate documents that he proposed be adopted by the corporation. (Tr. 876). However, these documents were never adopted by the corporation. (Tr. 876). Ms. Seguin, upon suggestion by Mr. Wadlow, hired Mr. Paul Guiliani, an attorney in Montpelier, Vermont, to draft the by-laws and other corporate documents for the corporation. (Tr. 875-76).

116. Ms. Seguin's stock comprises 20% of the corporation's equity. (Tr. 866). It was represented to Ms. Seguin that 20% was the minimum amount of equity that she had to acquire in order to obtain credit for her integration proposals. (Tr. 867). She obtained that stock for $100 which is the sum total of her financial contribution to the applicant (with the addition of expenditures she made for "a few postage stamps"). (Tr. 892-93). There are no documents that require Ms. Seguin to make any additional payments to the corporation, or on its behalf, either in connection with the prosecution of the application or the construction or operation of the station. (Tr.893).

David McMeekin

117. David McMeekin is a sole proprietor applicant. (McMeekin Ex. 1).

118. David McMeekin has no ownership interest in any medium of mass communications. (McMeekin Ex. 2).

119. Mr. McMeekin proposes to work as the general manager of the television station for no fewer than 40 hours per week. (McMeekin Ex. 1). As the general manager, he will have overall responsibility for the station's affairs. He will be solely responsible for station policy and will have ultimate authority over sales, programming, and hiring and firing of station personnel. Should he be granted the construction permit, McMeekin plans to leave his present employment (he is employed as a pilot for Sugarbush Management Company) and move to Burlington on a permanent basis.

120. Mr. McMeekin currently resides in Bennington, New Hampshire. (Tr. 823).

Comparative Coverage

121. Following are the total areas and populations which each applicant will cover within its predicted Grade B contour (Joint Engineering Ex. 1 [3 applicants]).

Applicant	Area (sq. km.)	Population
WCVQ	29,900	574,700
Nichols	29,400	562,300
Maple Leaf	14,300	51,000
Lake Champlain	21,400	453,800
Burlington Channel 44, Inc.	23,300	470,800
Burlington 44 Company	28,500	553,900
McMeekin	22,500	465,700

122. The following table illustrates the degree of service to underserved areas which each applicant would provide (Joint Engineering Exhibit 1 [3 applicants]; Joint Engineering Ex. 3).

Area (sq. km.)

Applicant	Service First	Second	Third	Fourth	Fifth
WCVQ	7	1,020	5,450	5,100	4,080
Nichols	3	930	5,380	4,930	3,980
Maple Leaf	0	0	0	0	0
Lake Champlain	0	10	2,470	2,180	2,320
Burlington Channel 44, Inc.	0	130	3,440	2,720	2,720
Burlington 44 Company	0	350	5,390	4,930	3,960
McMeekin	0	20	3,070	2,510	2,680

Population

Applicant	Service First	Second	Third	Fourth	Fifth
WCVQ	30	5,790	53,600	96,000	49,000
Nichols	10	5,350	53,400	92,600	47,000
Maple Leaf	0	0	0	0	0
Lake Champlain	0	1,380	37,200	30,500	21,600
Burlington Channel 44 Inc.	0	1,820	41,900	38,100	26,700
Burlington 44 Company	0	4,510	54,200	90,200	42,100
McMeekin	0	1,480	40,900	35,500	26,600

III. Conclusions of Law

WCVQ, Inc.

123. It appears that management decisions at the station will be made by a three member board of directors comprised of McClure, McGrath, and Newman. McClure selected McGrath and Newman to be board members because he knew that they possessed specific skills which they would contribute to the management of the station.

124. As WCVQ is structured, McClure, the only integrated principal, has only a one-third voice in the management of WCVQ and need not even be included in the business decisions of the corporation. Also, he can be outvoted by his fellow directors on those decisions in which he does participate.

125. McClure initially testified, without qualification, that he would "go along" with management decisions made by his fellow board members. As WCVQ argues, that testimony speaks to the value that McClure places on the views of those persons whom he has personally selected. (WCVQ Reply Proposed Findings, p. 5). McClure later testified at hearing that he would either abide by such decisions or he would exercise his power under the corporate by-laws to remove those directors if he did not agree with their decisions.

126. It is difficult to credit WCVQ's claim that McClure's power under the by-laws to remove his fellow directors provides the necessary assurance that only Mr. McClure will be "running the show." After all, McClure's fellow directors were personally selected by him in specific contemplation of the management skills that they would bring to bear. The view taken here is that McClure deliberately structured his corporation in such a way that he has only a one-third share in the management of the station. WCVQ is entitled to 33.3% quantitative credit for the integration of ownership into management.

127. Mr. McClure has resided in the proposed service area for the past eleven and one-half years. He resided in the City of Burlington from May 1971 to June 1977. This residence history entitles WCVQ to a moderate to substantial qualitative enhancement credit.

128. With respect to civic activities, WCVQ receives slight enhancement credit for McClure's production of video and voice recordings for Child-Seekers of Vermont, since some of this activity appears to have occurred after the "B" cut-off date. The same is true concerning McClure's participation as a parent volunteer in the Huntington Valley Pony Club. In 1987, Mr. McClure spent a total of 30 hours soliciting funds to help finance the Green Mountain Council of the Boy Scouts of America. This activity warrants slight enhancement. Similarly, Mr. McClure's involvement with the Vermont Council on the Arts, Media Grants Judging Committee, was a total of two days in duration, for which only slight enhancement credit will be awarded.

129. Mr. McClure's production of video documentaries, along with his other broadcast experience, entitles WCVQ to minor enhancement of its integration proposal.

Nichols Broadcasting Corporation

130. Nichols proposes to integrate its president, treasurer, sole director, and sole voting stockholder, John C. Nichols, into the management of the proposed station on a full-time basis. Nichols is awarded 100% quantitative integration credit.

131. Mr. Nichols has lived within the primary service contour of the proposed station since 1972. Nichols is entitled to a moderate enhancement credit for this residence. Nichols is entitled to moderate enhancement credit for Mr. Nichols' involvement with the Multiple Sclerosis Society, the March of Dimes, the American Cancer Society, the Howard Mental Health Services, and the American Red Cross. Finally, Mr. Nichols' considerable broadcast experience gains for the applicant minor qualitative enhancement of its integration proposal.

Maple Leaf Broadcasting Limited Partnership

132. Maple Leaf receives 100% quantitative integration credit for the proposal of its sole general partner, Thomas Ho, to serve as the general manager on a full-time basis. The proposal is substantially enhanced by virtue of Mr. Ho's minority status, and is slightly enhanced by Mr. Ho's promise of future local residence.

Lake Champlain Communications, Inc.

133. LCC admits that Ms. Smullen "has taken the laboring oar in the application preparation and prosecution phase of this project" (LCC Reply Proposed Findings, p. 9) She was the one who: retained corporate counsel; retained communications counsel; located LCC's transmitter site; retained a consulting engineer; prepared a proposed budget; obtained a financial commitment letter; prepared the application; and oversaw the preparation and filing of a Certificate of Incorporation and Articles of Incorporation with the State of Vermont.

134. Several of the competing applicants argue that LCC should receive no quantitative integration credit for the proposed participation of Ruth and Edward DesLauriers. They say this because, in their view, "only Ms. Smullen has engaged in any meaningful activities in prosecuting" the application, and neither Ruth nor Edward has "meaningfully participated" as decision-makers in the application process. But these competing applicants point to nothing which *requires* participation by an applicant's principal in the application process before that principal's integration claim will be credited. At most, non-participation in application preparation or prosecution is but one element that may be important in determining whether an integration claim is to be credited. *See, Utah Television Association Ltd. Partnership*, 102 FCC 2d 1470 (Rev. Bd. 1985); *Jarad Broadcasting Company, Inc.*, 1 FCC Rcd. 181 (Rev. Bd. 1987); and *Doylan Forney*, 3 FCC Rcd. 6330 (Rev. Bd. 1988). In fact, the competing applicants rely only on cases where integration credit was denied because the *totality of the circumstances* compelled the inference that putative active owners would not be truly integrated. For example, in *Religious Broadcasting Network*, 65 RR 2d 56 (Rev. Bd. 1988), claimed integration credit was reduced, not because of the lack of involvement in the application process by the minority owners, but primarily because those minority owners 1) had not even spoken to each other until the day of the hearing; 2) they never discussed their proposed management positions with anyone; 3) they first learned of those proposed management positions from reading the applicant's integration statement after it had been filed; and 4) the partners never discussed the terms of their association with each other or with anyone else. The Review Board has no difficulty in concluding that the applicant was "a

wholly fictional contrivance . . . knowingly intended to skew our comparative processes." In *Washoe Shoshone Broadcasting*, 3 FCC Rcd. 3948 (Rev. Bd. 1988), the integration proposal of Jessica Ordonez was discredited because she did not attend the organizational meeting of the applicant, she was not even under consideration to be a principal until her father suggested and negotiated a position for her, she did not participate in the selection of any of the other principals, she did not participate in apportioning equity interests, she never spoke with several of the other principals, she did not pay her initial capital contribution with her own funds, she did not know the identity of the engineer or who hired the engineer or counsel, and her description of her proposed duties at the station were to "assist" the other general partner.

135. The facts in the instant case show that each of the three LCC shareholders has meaningfully participated in corporate decision-making. After learning of the availability of Channel 44, all three of the LCC shareholders, at various times discussed the idea of applying for the construction permit, the structure of the prospective business, the ownership percentages to be held by each of them, the roles each would take in preparing the application and, ultimately, in operating and managing the station. Before the application was filed, the three shareholders also decided that Christina Smullen would be in charge of the day-to-day matters having to do with the preparation and prosecution of the application. No Commission rule or policy forbade such an agreement; nor is the agreement inherently suspect. The LCC shareholders are siblings; their agreement that Ms. Smullen would take care of day-to-day matters was compelled by legitimate practical considerations: Ruth DesLauriers was living in Chicago, and Edward DesLauriers was lacking in business experience and was also a student in school -- facts which would unduly complicate their ability to attend to day-to-day affairs. On this record, their relative non-participation in the "application preparation and prosecution phase of this project" gives rise to no inference that they will not be truly integrated in station affairs. LCC will receive 100% quantitative integration credit for the proposed full-time participation of its three stockholders.

136. The integration proposal is substantially enhanced because each of the three LCC stockholders is a minority. Moderate enhancement is awarded because 85% of the corporation is owned by fully participating females.

137. Ms. Smullen has lived within the city-grade coverage contour of the proposed station practically all of her life, with some residency in the City of Burlington itself. She presently resides in a suburb adjacent to the city. Ms. DesLauriers has lived within the city-grade coverage contour most of her life. She now resides in Chicago, but promises to move to Burlington if LCC receives the grant. Edward DesLauriers currently resides in the City of Burlington. For most of his life, he has lived within the city-grade coverage contour. These facts entitle LCC to a moderate-to-substantial enhancement credit for the residence of its principals.

138. Ms. Smullen's participation in civic affairs enhances her integration proposal to a moderate degree. Ms. DesLauriers' participation in civic affairs has been very slight, enhancing her intergration proposal to a very slight degree only. Mr. DesLauriers' proposal is slightly enhanced by his participation in civic activities. Overall, LCC is awarded slight-to-moderate enhancement for the civic participation of its principals.

Burlington Channel 44, Inc.

139. Burlington Channel 44 seeks 100% quantitative integration credit for Randy Daniels' proposal to work full-time as the general manager of its proposed station. The applicant will receive no integration credit.

140. Mr. Daniels is under written contract with Caroline Jones Advertising, Inc., with terms of at least $100,000 in annual salary, and requiring his best efforts to open a Company office on a full-time basis in the Bahamas, plus be available for other Company business. The contract has a three-year term of employment and was executed on September 1, 1988, six months after Burlington Channel 44's application was filed.

141. An applicant bears the burden of demonstrating a reasonable likelihood that its integration proposal will be fully effectuated. *Blancett Broadcasting Co.*, 17 FCC 2d 277, 15 RR 2d 1349 (Rev. Bd. 1969); *Lewis Broadcasting Corp.*, 11 FCC 2d 889, 12 RR 2d 627 (Rev. Bd. 1968). Mr. Daniels has provided no reasonable assurance that he can effectuate his integration proposal. While Mr. Daniels testified that his employer was aware of his possible need to "terminate" the contract, no writing of any kind supports this contention. The written contract is unequivocal in obligating Mr. Daniels to remain a full-time employee until August 31, 1991, as well as in requiring the mutual *written* consent of both parties to terminate the contract. The contract is explicit in giving Mr. Daniels' employer the unilateral right to terminate the contract.

142. Mr. Daniels' testimony on the point is sharply at variance with the express terms of the written contract. An applicant with contractual obligations which on their face appear to prevent effectuation of an integration pledge must demonstrate that the contractual obligations are not binding or that both commitments can be accommodated. *Washoe Shoshone Broadcasting*, 3 FCC Rcd. 3948, 3952-53 (Rev. Bd. 1988); *Leininger - Geddes Partnership*, 2 FCC 2d 3199 (Rev. Bd. 1987). Otherwise, an applicant who is contractually bound to full-time employment elsewhere will not be credited with full-time integration credit. *Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 680-683 (Rev. Bd. 1986).

143. Mr. Daniels has failed to persuasively demonstrate that despite his contractual obligation to work full-time in the Bahamas until August 31, 1991, his simultaneous pledge to the Commission to work full-time in Burlington, Vermont, is either plausible or probable. The integration proposal will not be credited.

144. If Mr. Daniels' integration proposal had been credited, the proposal would be substantially enhanced by Mr. Daniels' status as a racial minority, and slightly enhanced by his promise to move to Burlington, Vermont. Minor enhancement would also have been awarded for Mr. Daniels' extensive broadcast experience.

Burlington 44 Company

145. Burlington 44 will receive 100% quantitative integration credit for the proposed full-time participation in station management of its voting stockholder, and 20% equity owner, Ms. Seguin. Several of the competing applicants argue that quantitative integration credit should be reduced because of the role played by Mr. John Easton, Jr., in the formation and prosecution of Burlington 44's application. However, the record reflects that the bulk of Mr. Easton's activities occurred prior to Ms.

Seguin's involvement with Burlington 44 and thus prior to the formation of Burlington 44. There is nothing to indicate that Easton has exercised a dominant role in the affairs of Burlington 44 or that he will exercise control over Burlington 44 on an ongoing basis. *Victory Media, Inc.*, 3 FCC Rcd. 2073 (1988).

146. The integration proposal is moderately enhanced by Ms. Seguin's female status, and is substantially enhanced by her residence in Burlington since 1982. Minor enhancement is awarded because of Ms. Seguin's broadcast experience.

147. Ms. Seguin's husband is the chief engineer for AM broadcast station WVMT, Colchester, Vermont, a community adjacent to Burlington. One of the competing applicants argues that Burlington 44 should receive a slight diversification demerit under the "spousal attribution" doctrine because of this employment. However, no such demerit is warranted because the position of chief engineer has no meaningful impact on the Commission's diversification objectives. *Talleyrand Broadcasting*, 59 RR 2d 563 (Rev. Bd. 1985). Neither Burlington 44, its officers, directors, or shareholders, has any cognizable interest in any medium of mass communications.

David McMeekin

148. David McMeekin is entitled to 100% quantitative integration credit for Mr. McMeekin's proposed full-time involvement in the management of the proposed station. McMeekin receives a slight qualitative enhancement credit for his proposal to move to Burlington if his application is granted.

Comparative Coverage

149. There are no significant differences among WCVQ, Nichols and Burlington 44 Company respecting total areas and populations to be served. Similarly, there are no such differences among Lake Champlain, Burlington Channel 44, Inc. and McMeekin. The first group, namely, WCVQ, Nichols and Burlington 44 Company, merits a substantial preference over Maple Leaf on account of total coverage, but only a slight preference over applicants in the second group, namely, Lake Champlain, Channel 44, Inc. and McMeekin. In turn, this second group of applicants is entitled to a moderate preference over Maple Leaf.

150. With regard to service to underserved areas, WCVQ and Nichols are treated the same. Because they propose a small first service and a second service to over 5,000 persons, they receive a slight preference over Burlington 44 Company, whose second service is slightly smaller, and which does not propose any first service. WCVQ, Nichols and Burlington 44 Company are all entitled to a moderate preference over the remaining applicants. *See Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578, 582-83 (Rev. Bd. 1984). Lake Champlain, Burlington Channel 44, Inc. and McMeekin propose a significantly smaller second service. However, they, in turn, are awarded slight preferences over Maple Leaf, which proposes no service to underserved areas.

151. The foregoing comparative coverage preferences are combined so that WCVQ and Nichols warrant a slight preference over Burlington 44 Company and a substantial preference over all other applicants. In turn, Burlington 44 Company should receive a substantial preference over all other applicants. Lake Champlain, Burlington Channel 44, Inc. and McMeekin are entitled to a moderate preference over Maple Leaf.

IV. ULTIMATE CONCLUSIONS

152. No applicant receives a diversification demerit. Two applicants (WCVQ and Burlington Channel 44) receive less than 100% quantitative integration credit. The comparative attributes of the applicants receiving full integration credit are as follows: *Nichols* - 100% quantitative integration moderately enhanced by local residence and moderately enhanced by civic participation, with a minor credit for broadcast experience; *Maple Leaf* - 100% quantitative integration, substantially enhanced by minority ownership participation, and slightly enhanced by a promise of future local residency; *Lake Champlain* - 100% quantitative integration, substantially enhanced by minority ownership participation, moderately-to-substantially enhanced by local residence, and slightly-to-moderately enhanced by civic participation; *Burlington 44* - 100% quantitative integration, moderately enhanced by female ownership participation, substantially enhanced by local residence, with a minor credit for broadcast experience; and *McMeekin* - 100% quantitative integration, slightly enhanced by a promise of future local residency.

153. With respect to comparative coverage, Nichols is slightly preferred over Burlington 44, and substantially preferred over the other applicants. Except for Nichols, Burlington 44 is substantially preferred over the other applicants. Lake Champlain and McMeekin receive a moderate preference over Maple Leaf.

154. Burlington 44's overall proposal outweighs that of Nichols, even though Nichols has a slight preference over Burlington 44 under the comparative coverage aspect. Lake Champlain's overall proposal is slightly superior to that of Burlington 44, even though Burlington 44 receives a substantial preference over Lake Champlain under the comparative coverage aspect. Maple Leaf follows next, ahead of McMeekin.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the application of Lake Champlain Communications, Inc. IS GRANTED and the applications of WCVQ, Inc., Nichols Broadcasting Corporation, Maple Leaf Broadcasting Limited Partnership, Burlington Channel 44, Inc., Burlington 44 Company, and David McMeekin ARE DENIED. [3]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] WCVQ's by-laws provide that a director may be removed from office, with or without cause, by the voting stockholder. (Burlington Channel 44 Ex. 5, p. 6)

[2] With its opposition to motions seeking financial issues filed by Nichols Broadcasting Corporation and Burlington Channel 44, Inc., WCVQ submitted a Shareholder's Agreement, dated April 18, 1988, and this Agreement appears to confirm McClure's testimony on the point. However, the available evidence indicates some ambiguity about whether it is The Shaffran Companies or CC&E Equities, Ltd., that is to provide the requisite financing. Mr. Edward Shaffran signed WCVQ's original financial commitment letter on behalf of CC&E Equities, and he executed the Shareholder's Agreement on behalf of The Shaffran Companies. That ambiguity notwithstanding, however, the presiding officer's view of the evidence persuaded him that financial issues were not warranted, even though the issues had been added earlier by *Order*, FCC 89M-1594, released June 5, 1989. Thus, that Order was set aside by *Order*, FCC 89M-2018, released August 1, 1989. Burlington Channel 44 filed a Motion for Leave to Appeal that action on August 9, 1989. The motion presents no new or novel question, and no separate appeal is permissible.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Modification of the Commission's Depreciation Prescription Practices As Applied to AT&T and The Prescription of Revised AT&T Depreciation Rates — AAD 9-1935

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1989; Released: December 13, 1989

By the Commission:

I. INTRODUCTION

1. On February 15, 1989 the American Telephone and Telegraph Co. (AT&T) filed a petition seeking this Commission's approval of three changes in the procedures that we use to prescribe depreciation rates for AT&T. First, AT&T asks that we discontinue our regular triennial rate represcription schedule for AT&T and allow it to seek represcription of the rates that it uses for regulatory purposes (the book rates) in tandem with changes in the depreciation rates that it uses for financial reporting purposes (the FR rates). Second, AT&T requests that this Commission replace the current prescription of state-by-state depreciation rates for AT&T with a prescribed single set of nationwide depreciation rates. Third, AT&T requests that we base the prescription of its book depreciation rates on AT&T's FR rates. AT&T accompanied its petition with a schedule of proposed depreciation rates (which it subsequently revised in minor respects) and asks that we prescribe those rates effective January 1, 1989.

2. Based on our review of AT&T's petition, and in keeping with this Commission's recognition of the increasingly competitive marketplace conditions in which AT&T operates, we have decided to take the following actions to resolve the issues that AT&T raises. First, we discontinue the triennial review of AT&T's depreciation rates and instead will review AT&T's rates every two years. Second, we grant AT&T's request to discontinue the state-by-state depreciation studies that it currently submits to this Commission, and to use instead a single set of depreciation rates based on nationwide depreciation parameters. Finally, although we do not grant AT&T's request to base the book rates on its FR rates or to use depreciation procedures that are contrary to our rules, we direct the Common Carrier Bureau (the Bureau) to conduct a review of AT&T's need for revised depreciation rates using current depreciation rules and procedures. A Public Notice describing proposed rate revisions will be issued, and we thereafter will represcribe, to the extent required, AT&T's depreciation rates.

II. BACKGROUND

3. AT&T's petition is best viewed in light of the experience this Commission has gained in the 1980s regarding the prescription of depreciation rates for communications common carriers. We have described the evolution of our depreciation practices and policies in considerable detail in other depreciation orders, and thus we need not set forth a detailed history herein.[1] Briefly stated, depreciation accounting is the mechanism through which a carrier distributes the loss in service value of its assets to operating expenses. These depreciation expenses are recovered from ratepayers over the service life of the assets to which they relate. The depreciation rate is a function of the asset's service life and net salvage value, both of which must be forecast. For communications common carriers, the calculation of depreciation rates is of utmost importance because depreciation expense is a major cost of providing telecommunications service. Thus, we have placed great importance on ensuring that carriers subject to our jurisdiction recover their capital in a timely manner. Our authority to prescribe depreciation rates is contained in Section 220(b) of the Communications Act, which requires that we prescribe, "as soon as practicable," depreciation rates for carriers for whom we have prescribed an accounting system.[2]

4. As we noted in the *Amortization NPRM*, changes in the carriers' switch replacement plans in the 1970s caused a situation in which the theoretical depreciation reserve (*i.e.*, the reserve that was needed to match life and salvage characteristics and age of the plant) was far larger than the accumulated book reserve. In depreciation terms, the result was a substantial reserve imbalance. Our initial response to the industry's reserve imbalance was our adoption of the *Property Depreciation Order*,[3] in which we changed our depreciation prescription procedures to reduce the possibility that our prescribed rates would be based on large errors in forecasting asset service lives and net salvage values. We committed this Commission to consider carefully company plans for plant replacement, technological developments and other factors, and we adopted the remaining-life method of accounting to reduce the existing reserve imbalance.[4]

5. As a further step to assuring prompt capital recovery, we thereafter determined that an additional step might be necessary to bring about a more timely closure of the gap between the carriers' book reserves and theoretical reserves. We agreed to consider, on a case-by-case basis, the appropriateness of a carrier amortizing its reserve imbalance over a specified period, rather than waiting for the remaining-life procedures to reduce the imbalance. At first we proceeded only when a carrier's state regulatory commission concurred in the request.[5] Thus, we granted amortization authority for certain of AT&T's separate Interexchange Companies (IXCs)[6] in 1985, depending in part on whether the state exercising intrastate jurisdiction over the IXC concurred in the request.[7] Also, in 1985 we authorized AT&T to amortize the reserve deficiency for its Interstate Division (ISD) over a four-year period.[8] After the Supreme Court's decision in *Louisiana PSC*,[9] however, we adopted a uniform four-year reserve imbalance amortization for the IXCs that had not received amortization authority in 1985.[10] We also revisited the issue of amortization of the LECs' reserve imbalances, and in the *Amortization Order* we adopted a five-year uniform amortization for all LECs for whom we prescribe depreciation rates and who had not previously been granted

amortization authority. We stated in these orders that we were confident that the amortizations, along with our continued application of remaining-life procedures, would eliminate the carriers' reserve deficiencies and ensure the timely recovery of capital investment.

III. AT&T'S PETITION

6. In its petition, AT&T states that this Commission must ensure that the depreciation practices and prescribed rates applicable to AT&T reflect the "economic realities of the interexchange marketplace" in which AT&T operates.[11] Asserting that those practices were developed for use by carriers operating in a monopoly environment, AT&T concludes that they have failed to produce depreciation expenses and reserves that reflect the dynamic nature of the market for interexchange communications. Accordingly, AT&T asks that we modify our current triennial review process and, on an ongoing basis, establish the prescribed book rates on the basis of AT&T's FR rates. Citing the wide difference between its FR reserve and book reserve,[12] AT&T claims that the FR rates are more reliable indicators of the economic life of its plant, whereas the procedure of prescribing separate book rates is not attuned to existing marketplace realities. In AT&T's view, basing the book rates on the FR rates contains safeguards to ensure the accuracy and reliability of its depreciation rates. In support of that position, AT&T first asserts that the FR rates are set in accordance with generally accepted accounting principles (GAAP), and are reflected in financial statements only after the rigorous scrutiny of its independent auditors. Moreover, AT&T states, this Commission would retain statutory control over the book rate prescription process. AT&T also states that the FR process is subject to the oversight of the Securities and Exchange Commission, and any failure to conform the FR rates with GAAP might result in sanctions from that agency. Finally, according to AT&T, competitive forces deprive it of any incentive to inflate its depreciation rates because its prices must respond to market conditions and those conditions do not allow it simply to pass on costs to consumers.

7. AT&T states that if it is to be allowed to base its book depreciation rates on its FR rates, this Commission must modify the current practices applicable to its represcription process in two ways. First, AT&T asks that it be allowed to review and seek modification of the rates each year. The present procedures allow AT&T to file a full depreciation study every three years, although we have allowed carriers to file annual update studies to reflect changes caused by plant additions and retirements. An annual represcription, according to AT&T, will allow it to adjust rapidly its depreciation expenses when the service lives and salvage values underlying its depreciation rates change.

8. AT&T also asks that we amend our practices to allow it to apply the same depreciation rates nationwide for each plant category. Currently, this Commission prescribes one schedule of depreciation rates for the Interstate Division and a different set of rates for each state in which each IXC operates. AT&T asserts that prescribing separate IXC rates for each state reflects our traditional policy of accommodating state interests in prescribing depreciation rates, since we once asserted that those rates were to be used for state ratemaking purposes. However, states AT&T, the Supreme Court's decision in *Louisiana PSC* held that we are without authority to prescribe depreciation rates and practices for intrastate ratemaking purposes, and thus we no longer have any reason to set its depreciation rates on a state-by-state basis. AT&T notes that it sets its FR rates on a nationwide basis and we prescribe nationwide ISD rates, and it claims that the ISD and IXC assets are indistinguishable for purposes of capital recovery. AT&T states that it operates its network and applies new technology as a single, nationally integrated network, and its depreciation rates should reflect that fact. Moreover, according to AT&T, use of nationwide rates will reduce unnecessary regulatory burdens that the current procedures place on all parties.

9. In support of the arguments summarized above, AT&T attached to its petition a statement of a partner in the accounting firm responsible for the annual audit of AT&T Communications, and a statement by an expert in depreciation rate practices and policies. AT&T also filed a schedule of proposed depreciation rates that it seeks to have prescribed as of January 1, 1989. AT&T asserts that the currently prescribed rates are not at a level that allows it an opportunity to recover its capital costs within a meaningful time period. Accordingly, it proposes rates that will recover the difference between its book and FR reserves over a five-year period.

10. We placed AT&T's petition on public notice on August 28, 1989.[13] We invited comment on both AT&T's proposed change in the represcription procedures applicable to AT&T, and on the proposed revised depreciation rates. Comments were filed by The Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation, South Central Bell Telephone Co. and Southern Bell Telephone and Telegraph Co. (BellSouth), New York Telephone Co. and New England Telephone and Telegraph Co. (NYNEX), Pacific Bell and Nevada Bell (PacTel), Southern New England Telephone Co. (SNET), United States Telephone Association (USTA), the Ad Hoc Telecommunications Users Committee (Ad Hoc Committee), the People of the State of California and the Public Utilities Commission of the State of California (California), the staff of the Arkansas Public Service Commission (Arkansas staff),[14] and the staff of the Michigan Public Service Commission (the Michigan Staff).[15] Reply comments were filed by AT&T, BellSouth, the staff of the New Jersey Board of Public Utilities (the New Jersey staff) and Southwestern Bell Telephone Co. (SW Bell). The positions expressed in those comments will be summarized and discussed in the following paragraphs.

IV. DISCUSSION

A. *Scope of this Proceeding*

1. *Positions of the Parties*

11. In its petition, AT&T sought a change in this Commission's depreciation prescription procedures applicable only to AT&T and a represcription of its depreciation rates. The *Public Notice* invited comment only on those issues. Moreover, AT&T did not seek waiver or amendment of any rule, and accordingly we did not institute a Rule Making proceeding to deal with the matters AT&T raised.[16] The LECs' responses, however, seek to expand this proceeding into an examination of our depreciation practices applicable to all subject carriers. Bell Atlantic, for example, states that our practices are outmoded as to

all carriers and thus this Commission should allow other carriers to seek relief similar to that which AT&T requests. It points to a petition (a copy of which it attached to its comments) that it filed seeking depreciation represcription changes for any carrier willing to accept the safeguards it suggests, and observes that all carriers should benefit from the reduced regulatory burden that AT&T seeks.

12. BellSouth likewise supports the objective of AT&T's petition, but asserts that it can accept neither the rationale advanced by AT&T nor institution of fundamental policy changes in this area without a Rule Making. BellSouth states that this Commission has found AT&T to be a dominant carrier, and depreciation procedures for dominant carriers should be similar. BellSouth accordingly recommends that we treat AT&T's petition as a petition for Rule Making to modify Section 43.43 of our rules to relieve any carrier under price cap regulation from the filing requirements contained therein.[17]

13. NYNEX also states that our current depreciation represcription procedures are burdensome and not a reasonable way to achieve our regulatory objectives. It asserts that there is no need to continue an elaborate process for depreciation rate represcription for any carrier under price cap regulation. Accordingly, NYNEX supports AT&T's request that AT&T be allowed to set its book rates on the basis of its FR rates (although it takes no position with respect to the specific depreciation rates that AT&T proposes). SNET also requests that we expand this proceeding to address depreciation reform for the LECs. SNET urges us to consider herein the impact of AT&T's proposal on the LECs, because, in its view, adopting revised depreciation represcription procedures only for AT&T may prohibit the LECs from achieving the same level of capital recovery and, ultimately, preclude a LEC from maintaining the same rate of technology introduction.

14. PacTel also asserts that changing the depreciation practices applicable to AT&T without commensurate modification of the practices applicable to the LECs will disadvantage the LECs in their provision of competitive services. PacTel is concerned that AT&T will be able to underprice the LECs if its proposal is granted. PacTel also asserts that the LECs require more flexibility in the way in which their depreciation rates are prescribed, and it agrees with AT&T that the depreciation represcription process is expensive and burdensome. Accordingly, PacTel asks that we instead consider Bell Atlantic's proposal so that we may avoid the negative consequences to the LECs that PacTel considers inherent in AT&T's petition. USTA generally asks that we deal with capital recovery issues in a broader context than the subject proceeding, citing the importance of those issues to the LECs. It states that a significant change in depreciation procedures should not be undertaken for one competitor in a market without assessing the procedures for others similarly situated.[18]

15. AT&T replies that questions about the depreciation practices applicable to the LECs are not at issue in this proceeding, and that the conditions that affect depreciation methods for the LECs are significantly different than for AT&T. In its view, the applicability of the proposed depreciation modifications to the LECs should be considered in another proceeding.

2. Discussion

16. There is no reason to expand the scope of AT&T's request beyond the issues that AT&T raised therein. First, we note that we did not invite comment on the issue of depreciation practices applicable to the LECs.[19] Accordingly, it would be improper to adopt changes in those practices herein without giving all interested parties an opportunity to comment thereon.

17. Moreover, we do not agree with BellSouth's suggestion that we treat AT&T's petition as a petition for Rule Making. BellSouth proposes that we do so, and it urges us to adopt a rule exempting a carrier under price cap regulation from filing *any* data regarding its depreciation rates. Its proposal even appears to exempt such carriers from any form of depreciation rate prescription.[20] Nothing in AT&T's petition suggests that AT&T is asking for a change in Section 43.43 of our rules. We do not adopt BellSouth's proposal because we do not intend to deprive ourselves of the data that we need to continue our regulatory oversight in this crucial area.[21]

18. As discussed below, we are not making any fundamental changes in the principles underlying the prescription of depreciation rates for AT&T.[22] Thus, our action herein provides no basis for the LECs' concern that one dominant carrier will be favored over others, or is being accorded regulatory treatment that will give it an advantage over competitors. Finally, we believe that the LECs overstate the need for this Commission's examination of our depreciation prescription practices when they assert in general terms, for example, that our procedures place their recovery of invested capital at risk.[23] We note that it was just two years ago that we took action to resolve any problems that exist in the LECs' ability to promptly recover the capital invested in providing telephone service by adopting a uniform amortization of the LECs' depreciation imbalances over a five-year period.[24] We stated in the *Amortization Order* that we would continue to set the LECs' depreciation rates on a jurisdiction-by-jurisdiction basis after considering conditions existing in their jurisdictions and consulting state regulatory agencies.[25] We noted that a LEC requesting further relief through amortization would have to make a strong threshold showing why our depreciation policy initiatives of the past decade have been inadequate for it to recover its capital in a timely manner.[26] We expressed our confidence that our actions would accelerate the LECs' recovery of their reserve deficiencies. Although the LECs do not request herein further amortization authority, the factually unsupported statements in their comments regarding alleged inadequate capital recovery fail to convince us that action on their behalf is now needed.[27] Accordingly, we will limit this proceeding to review of the relief sought by AT&T.

B. *Use of FR Depreciation Rates for Regulatory Purposes*

1. Positions of the Parties

19. Several LECs generally support AT&T's request to use its FR rates for book purposes. NYNEX states that in a dynamic industry such as telecommunications, there are no "right" answers for the depreciation rate parameters and we should defer to the carrier's perception of the marketplace conditions it faces. SNET also agrees that a carrier's FR rates are more representative of the "economic plant equipment lives" than are the book rates.[28]

The Ad Hoc Committee states that it does not oppose AT&T's request that its FR rates and book rates be the same, but it recommends that the matching should not be delayed for five years. Rather, the Ad Hoc Committee recommends that AT&T take a one-year write-down to eliminate the disparity between its FR and book reserve levels.

20. Four parties opposed AT&T's request to base its book depreciation rates on the FR depreciation rates. The Arkansas staff states that the use of FR rates permits a carrier to use accelerated depreciation methods that may not be appropriate for ratemaking purposes. The Arkansas staff states that this Commission might implement revised depreciation procedures for AT&T that do not require that the FR and book depreciation rates be identical. PacTel asserts that this Commission should not prescribe FR depreciation rates for AT&T even if that change were extended to the LECs, because such action would give AT&T an unfair competitive advantage. According to PacTel, AT&T (unlike the LECs) does not need to conform with Statement of Accounting Standards No. 71 (SFAS 71), which states that for regulated companies, financial statements must show expense levels only to the extent that the expenses are recognized for ratemaking purposes. Since most LEC operations are primarily intrastate, adoption of AT&T's proposal for the LECs would result in only a minor change in the depreciation rates reflected in their financial statements.[29] This disparity would, in PacTel's view, give AT&T a competitive advantage because it would be able to reduce its rate base more rapidly and thus be able to underprice its competitors.[30]

21. California states that there has been no change in the competitive environment warranting revisions in the basic depreciation methodology that we should use for AT&T. California notes that our procedures take into account the impact of technological changes and market pressure, that we have shortened the service lives of AT&T's assets and that we have amortized its depreciation reserve deficiency. The New Jersey staff also states that AT&T has not demonstrated a need for different depreciation procedures, because it has not shown how current procedures have caused a reserve deficiency problem or loss of market share. The New Jersey staff believes that any issues regarding how this Commission regulates long distance carriers should not be addressed in a depreciation filing.

22. In its reply, AT&T challenges PacTel's assertion that AT&T's use of FR depreciation rates for regulatory purposes will give it a competitive advantage. AT&T states that AT&T and the LECs operate in different markets and that, in any event, the depreciation changes will not affect its prices because those prices are set by the price cap rules. AT&T also disagrees with California's assertion that there have been no recent substantial changes in the competitive environment for its services, citing the growth in competition for interexchange services and rapid deployment of technological advances.

2. ***Discussion***

23. We conclude that AT&T has not made a sufficient showing that this Commission should base AT&T's book rates on the depreciation rates that it uses for financial reporting purposes. Initially, we observe that the present depreciation procedures have worked well for AT&T, in terms of ensuring more rapid capital recovery. Our recent depreciation orders have allowed AT&T to increase substantially its depreciation reserve, from 24.8% of plant as of January 1, 1984 to 39.1% as of January 1, 1989. AT&T does not state in its petition in what specific manner this Commission has been remiss in our depreciation rate prescriptions of recent years. Rather, it relies upon the fact that in 1988 it took a $6 billion writedown of its asset value for financial reporting purposes.[31] This event may indicate that a new look at AT&T's depreciation situation is warranted, notwithstanding our recent depreciation represcriptions, and we are accordingly initiating herein an inquiry into AT&T's need for revised depreciation rates. However, that assessment can be accomplished using current procedures rather than depreciation rate methodologies that go well beyond those that we have traditionally employed. We have taken a series of initiatives during the past decade to ensure that carriers are able to adjust their depreciation rates promptly to recover capital investment costs as quickly as possible under the federal regulatory scheme. We do not see a need now to abandon one of those initiatives to address what appears to be a temporary problem that can be resolved with measures less drastic than those suggested by AT&T. Accordingly, we do not grant this aspect of AT&T's request. However, we will consider below the other aspects of AT&T's petition that it advanced as means to implement the use of FR rates. Those proposed changes will increase the speed of AT&T's capital recovery and reduce the burden on both AT&T and this Commission in the represcription process, without thwarting our regulatory responsibilities.

C. ***Use of Nationwide Depreciation Rates***

1. ***Positions of the Parties***

24. Three parties commented specifically on AT&T's request that we prescribe depreciation rates on a nationwide, rather than state-by-state basis, for its IXC operations. The Arkansas staff states that AT&T's request in this area is "not unreasonable," and treating AT&T's operations as one entity would reduce the amount of information to be filed. California opposes the request as inappropriate, because plant composition, usage and demand, and competition vary from state to state. It thus recommends that we continue to evaluate these factors on a state-by-state basis. The Michigan staff asserts that if AT&T convinces this Commission to abandon depreciation recordkeeping specific to Michigan plant, AT&T will seek to have the Michigan Public Service Commission (PSC) take the same approach, citing the Commission's action as precedent. AT&T's use of nationwide depreciation rates in Michigan would increase its depreciation expense for that jurisdiction by nearly $2.5 million, according to the Michigan staff, and produce depreciation rates two to three times higher than the rates of other telecommunications companies subject to Michigan PSC regulation. Accordingly, the Michigan staff prefers that we continue to set AT&T's depreciation rates for Michigan pursuant to three-way meetings to arrive at a common set of depreciation rates that AT&T and both regulatory agencies find acceptable.

25. AT&T asserts in its reply that if it sets rates on a nationwide basis, it will continue to book depreciation accruals for each state jurisdiction. AT&T also points out that grant of this request would not affect a state's authority to set depreciation rates for regulatory purposes, citing *Louisiana PSC*.

2. *Discussion*

26. We believe that AT&T's depreciation rates no longer need to be established on a state-by-state basis. Initially, we note that AT&T, unlike the LECs, has established an integrated, nationwide communications network. Although it is important to examine and understand the individual parts of the network on their own merits, it is more important to examine them from a perspective of how they fit into the overall network. For example, interexchange trunks between two cities in two different LATAs within a state always carry interstate traffic as well as traffic between those cities. Moreover, when other, parallel facilities in the nationwide network are in an overflow condition or are inoperable, the interexchange trunks in question may be used to carry even more interstate traffic. Thus, the interexchange facilities between these two cities are engineered not only to serve the traffic patterns between the cities, but also to serve the need for alternative routing capacity for the overall network.[32]

27. Moreover, we do not require financial reports from AT&T on a company-by-company basis; rather, AT&T files a consolidated report for AT&T Communications that encompasses all of its interstate operations.[33] Thus, there is now no specific correlation between its depreciation studies and its financial reports. Finally, we observe that state-by-state depreciation rate studies for AT&T made sense in the regulatory environment before *Louisiana PSC*, because AT&T was expected to use the rates we prescribed in its state depreciation filings. The states may now prescribe depreciation rates for intrastate ratemaking purposes that differ from the rates we prescribe, and they may and do ask AT&T to submit depreciation rate studies of the assets located in the subject jurisdiction.[34] We conclude, however, that we do not need the state-by-state data for our regulatory purposes as a matter of course.[35]

28. We will, of course, continue to keep the state regulatory commissions fully informed about our review of AT&T's depreciation rate studies and to seek their views before we take action on AT&T's proposals. Also, our staff will continue to be available to meet with the state staffs to discuss matters of common concern.[36] Although our action may require certain state commissions to independently seek information from AT&T that previously was available from this Commission, we believe that the small additional burden imposed on them is outweighed by the abolition of a burdensome recordkeeping requirement on both AT&T and this Commission that produced no substantial federal regulatory benefits.

D. *Interval Between Represcription*

29. No party commented specifically on that part of AT&T's request in which it seeks authority to request a change in its depreciation rates in tandem with changes in its FR rates, rather than as part of a three-year prescription schedule (although parties agreeing with AT&T's proposed use of FR rates presumably agree with that proposition). Although we have decided not to base AT&T's book rates on its FR rates, we believe that the issue of a represcription schedule for AT&T warrants examination. AT&T operates in a market in which the level of competition is more pervasive than is the competition that the LECs face, although we have noted that the long run prospects for competition in the latter market are significant.[37] We have also acknowledged that the interstate toll market is "steadily yielding" to competitive pressures.[38] In view of these findings, we conclude that AT&T should not be held to a triennial depreciation rate review schedule. Clearly though, we are not able to conduct a full depreciation rate review and prescribe new rates annually, even with the simplified procedures established herein. Accordingly, we will allow AT&T to file proposed changes in its depreciation rates every two years. We find this to be a reasonable accommodation between AT&T's need for prompt recognition of depreciation expense and elimination of reserve deficiencies and our ability to give AT&T's studies our full attention.[39]

E. *AT&T's Depreciation Rate Filing*

30. As noted in para. 22, *supra*, we do not allow AT&T to use book depreciation rates that are based solely on its FR rates. However, rather than simply reject AT&T's proposed depreciation rates, we will instead examine the extent to which we should represcribe AT&T's rates in light of our decision herein allowing AT&T to use nationwide depreciation rates. Accordingly, we direct the Bureau to conduct a review of AT&T's need for revised depreciation rates in accordance with our existing rules and procedures, and using current rate parameter data. A Public Notice will be issued describing the extent to which that study shows a need for revised depreciation rates, and comments will be invited thereon. We will thereafter represcribe AT&T's rates, to the extent necessary.

V. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), 201-205 and 220(b), that the Petition filed by American Telephone and Telegraph Co. on February 15, 1989 seeking revisions in the procedures applicable to prescription of its depreciation rates IS GRANTED, to the extent set forth above, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A detailed discussion of depreciation procedures and our recent experience and initiatives in this area is set forth in *Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, Notice of Proposed Rule Making*, 2 FCC Rcd 6473 (1987) (*Amortization NPRM*). The *Amortization NPRM* also contains definitions and illustrations of certain depreciation terms and concepts that are used in this order. That proceeding culminated in a uniform reserve imbalance amortization for the LECs as a means of decreasing more quickly their reserve deficiency. *See Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers*, 3 FCC Rcd 984 (1988) (*Amortization Order*).

[2] 47 U.S.C. Sec. 220(b). We presently prescribe depreciation rates for carriers that have been found to be dominant in the provision of any service and have annual operating revenues of $100 million or more. *See* 47 C.F.R. Sec. 43.43(a); Amendment of Sections 43.42 and 43.43 of the Commission's Rules and Regulations to Increase the Revenue Threshold for Filing Pension and Depreciation Reports, 3 FCC Rcd 6908 (1988) (*Part 43 Report and Order*).

[3] Amendment of Part 31 (Uniform System of Accounts for Class A and Class B Telephone Companies), 83 FCC 2d 267 (1980) (*Property Depreciation Order*), *recon.*, 87 FCC 2d 916 (1981), *Supplemental Opinion and Order*, 87 FCC 2d 1112 (1981).

[4] Remaining-life procedures provide the carriers an opportunity to recover a reserve imbalance over the remaining life of the account by factoring the reserve into the depreciation rate determination. Our previous ("whole-life") procedures did not adjust the depreciation rates to recognize the existence of a reserve imbalance.

[5] *See, e.g.*, Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as amended, for: The Chesapeake and Potomac Telephone Co. *et al.*, 99 FCC 2d 1094 (1984).

[6] AT&T owns 24 IXCs. These IXCs were created at divestiture and initially contained the interLATA facilities owned by the Bell Operating Companies (BOCs) and ceded to AT&T pursuant to the Modification of Final Judgment. The IXCs and AT&T's Interstate Division make up AT&T's integrated nationwide network.

[7] The Prescription of Revised Depreciation Rates for: AT&T Communications of California *et al.*, FCC 85-568 (released October 23, 1985), *recon.*, FCC 86-185 (released April 18, 1986).

[8] The Prescription of Revised Depreciation Rates for AT&T Communications - Interstate Division, 101 FCC 2d 137 (1985).

[9] Louisiana Public Service Commission v. F.C.C., 476 U.S. 355 (1986) (*Louisiana PSC*).

[10] The Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as amended, for: AT&T Communications of California *et al.*, 4 FCC Rcd 1466 (1989).

[11] AT&T Petition at 1.

[12] AT&T notes that due to a recent writedown in the value of its assets, it increased its depreciation reserve for financial reporting purposes by over $6 billion. AT&T Petition at 3.

[13] *Public Notice*, AT&T Petitions for Modification of Commission Procedures for Prescribing its Depreciation Rates; Files Proposed Revised Depreciation Rates, 4 FCC Rcd 6669 (1989) (*Public Notice*).

[14] The Arkansas staff styled its comments as "informal comments" that do not reflect the position of the Arkansas Public Service Commission.

[15] The Michigan staff's comments were untimely filed on October 30, and were not accompanied by a petition to accept the late filing. Rather, the Michigan staff asserts that it found out about the pleading cycle only a week before comments were due. Although the Michigan staff has not established good cause for its late filing, we will accept its comments in view of our desire to take state regulatory concerns into account in resolving this matter.

[16] PacTel asserts that AT&T's proposal is inconsistent with our rules because Section 32.2000(g)(1)(i) requires a carrier to use the straight-line method of depreciation, whereas AT&T uses the sum-of-the years' digits method for certain plant for FR purposes. PacTel Comments at 9-10. In light of our decision not to prescribe the FR rates for AT&T, we need not address whether AT&T should have filed a petition specifically seeking waiver of that rule.

[17] Although BellSouth does not so state, it apparently also would exempt any carrier under price cap regulation from the provision of Section 43.43 that requires a carrier to obtain prior Commission approval to change a depreciation rate if this Commission has prescribed that rate. *See* BellSouth Comments at 4.

[18] The Arkansas staff notes in its informal comments that the LECs may seek in this proceeding to be granted treatment similar to that accorded AT&T. Because of the differences in the competitive pressures experienced by the LECs and AT&T, the Arkansas staff urges us not to alter the procedures by which we prescribe the LECs' depreciation rates.

[19] The *Public Notice* invited comment only on depreciation practices and rates applicable to AT&T.

[20] BellSouth's proposal also raises legal issues as to our authority to exempt major carriers from depreciation rate prescription. *See* Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3015 (1989) (*Price Caps Report and Order and Second Further Notice*).

[21] Of course, if the LECs have suggestions that would relieve them of certain unnecessary burdens now associated with complying with Section 43.43, they should bring them to the attention of our staff. It may be that some relief in this regard can be accomplished without resort to Rule Making or adopting fundamentally new depreciation policies.

[22] *See* para. 23, *infra*.

[23] *See, e.g.*, PacTel Comments at 5; SNET Comments at 2 (our practices purportedly fail to reflect the dynamic nature of the marketplace).

[24] *See Amortization Order*, *supra*, 3 FCC Rcd at 988-9, paras. 27-8.

[25] *Id.* at 988, para. 21.

[26] *Id.* at 989, para. 30.

[27] We note that the LECs' end-of-year depreciation reserve has increased from 18.1% of plant in 1980 to 33.8% in 1988. These percentages (which do not include the full effect of the five-year depreciation reserve amortization) convincingly demonstrate that our policies are working well for the LECs.

[28] SNET Comments at 2.

[29] PacTel assumes in this regard that the states would continue to set rates on the basis of book depreciation rates.

[30] PacTel also questions the accuracy of the depreciation rates that AT&T filed, and states that there is a potential to compute an "overly aggressive" book rate. PacTel Comments at 10. In view of our decision to reject AT&T's depreciation rate filing, we need not resolve PacTel's concerns about AT&T's specific proposed rates.

[31] We will not require AT&T to take a similar one-year writedown for regulatory purposes, as the Ad Hoc Committee suggests. That suggestion was based on the Ad Hoc Committee's position that the regulatory and FR depreciation practices should be identical, and we do not adopt that position.

[32] *See, generally*, AT&T Reply Comments dated January 11, 1985, Appendix B, filed in connection with its 1984 depreciation rate filing.

[33] *See Part 43 Report and Order*, 4 FCC Rcd at 6910. In contrast, the LECs file certain regulatory reports on a study area basis and we use those reports during our review of their tariffs.

[34] Although California and the Michigan staff oppose the discontinuance of AT&T's state studies, neither party asserts that it is without legal authority to obtain from AT&T depreciation data on assets located in its jurisdiction.

[35] We retain, of course, the ability to obtain from AT&T depreciation parameter data applicable to a particular jurisdiction if we have a need therefor.

[36] As noted in para. 18, *supra*, we have recently affirmed our commitment to consult with state commissions prior to establishing depreciation rates for the LECs, and to set the LECs' rates on a state-by-state basis.

[37] *Price Caps Report and Order and Second Further Notice*, 4 FCC Rcd at 3144-5.

[38] *Id.* at 2942.

[39] Because AT&T filed revised depreciation rates in 1989, it will be able to file a new depreciation rate schedule in 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 6, 1989

AMERITECH OPERATING COMPANIES FILE PETITION FOR WAIVER IN CONNECTION WITH ESTABLISHMENT OF NEW SWITCHED ACCESS RATE ELEMENT

Pleading Cycle Established

On November 21, 1989, Ameritech Operating Companies (Ameritech) filed a petition for waiver of Part 69 of the Commission's Rules to permit the establishment of a new switched access rate element for the recovery of costs incurred in the provision of Signal Transfer Point (STP) Access Service. Ameritech describes STP as a new service offering which allows a customer to interconnect with the Ameritech Operating Companies' Common Channel Signaling network. On the same date, Ameritech filed Transmittal No. 396, to introduce STP Access Service and establish rates for the service. The tariff transmittal is scheduled to become effective January 5, 1990.

Interested parties wishing to comment on the Ameritech waiver petition and file petitions against Transmittal 396 should consolidate their submissions in one pleading filed no later than December 15, 1989. Reply comments concerning the waiver may be filed no later than December 26, 1989.

Copies of Ameritech's waiver petition and tariff transmittal may be obtained from International Transcription Service (ITS). The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all comments, petitions, and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each comment or reply must be filed with ITS.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of Interstate Access Charges to Interstate IntraLATA Carriers

ORDER

Adopted: December 5, 1989; Released: December 8, 1989

By the Chief, Common Carrier Bureau:

1. On November 14, 1989, the Pacific Northwest Bell Telephone Company (Pacific) filed a petition for declaratory ruling (petition) that seeks to have the Commission declare: (1) that the National Telephone Company (NTC) is an interstate common carrier subject to the payment of interstate access charges for local exchange access services; (2) that "NTC must pay for interstate access services at the same tariffed rates as other interstate carriers;"[1] and (3) that "NTC's obligation to pay tariffed rates for interstate access services cannot be waived by [Pacific]."[2] On November 22, 1989, the parties filed a letter jointly requesting that the Commission extend the time for NTC to submit a pleading in response to Pacific's petition until January 30, 1990.[3] The letter also suggests that the Commission not issue a Public Notice on the petition until NTC files its response.

2. The parties state that the requested deferral will afford sufficient time for NTC's newly retained counsel to become familiar with the case, meet with Pacific's counsel, and attempt to refine the issues that form the basis for the petition. Pacific and NTC also state that following this timetable and approach may ultimately save Commission time and resources.[4]

3. Section 1.46(a) of the Commission's rules states that extensions of time shall not be granted routinely.[5] Here, however, the parties have shown good cause for an extension. Permitting additional time for NTC's newly retained counsel to become familiar with the issues and to meet with Pacific's counsel for the purpose of refining those issues holds the prospect of increasing the administrative efficiency with which this matter can be addressed. As a consequence, we are deferring the date for NTC's responsive pleading to January 30, 1990.

4. ACCORDINGLY, IT IS ORDERED, that NTC SHALL FILE its response to Pacific's petition on or before January 30, 1990.[6]

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Pacific Petition at iii.

[2] *Id.* The petition was filed pursuant to an Order of the United States District Court for the District of Oregon in *National Telephone Co. v. Pacific Northwest Bell Telephone* Co., Civil No. 89-318MA, referring certain issues in that proceeding to the Commission.

[3] Letter to Richard M. Firestone, Chief, Common Carrier Bureau from Linda K. Smith, Counsel for NTC, and Robert H. Jackson, Counsel for Pacific, dated Nov. 22, 1989 (Letter).

[4] Letter at 1.

[5] 47 C.F.R. § 1.46(a) (1988).

[6] This action is taken pursuant to the authority that the Commission has delegated under Sections 0.91 and 0.291 of its Rules, 47 C.F.R. §§ 0.91, 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-363

In the Matter of

Chicago Metropolitan
Area Region 54
Public Safety Plan

ORDER

Adopted: December 5, 1989; Released: December 13, 1989

By the Acting Chief, Private Radio Bureau and the Chief Engineer:

I. INTRODUCTION

1. By this action, we accept the regional public safety plan for the Chicago Metropolitan Area, Region 54. The requirements for regional public safety plans are contained in the Commission's *Report and Order* in Gen. Docket No. 87-112.[1] The Region 54 Plan is the fourth regional plan we have accepted[2] and represents the culmination of the efforts of the many public safety organizations that participated in its development.

II. BACKGROUND

2. On December 8, 1983, Congress directed the Commission to develop a plan to ensure that the present and future electromagnetic spectrum requirements of state and local public safety authorities be considered in the agency's spectrum allocation decisions. [3] The Commission, in response to this Congressional directive, subsequently allocated six megahertz of spectrum in the 821-824/866-869 MHz bands for use, nationwide, by public safety authorities. In making this allocation decision, however, the Commission provided that the spectrum would not be made available for licensing until a National Plan was developed to ensure the efficient use of the new allocation.

3. To assist in the development of this National Public Safety Plan, in December 1986, the Commission established the National Public Safety Planning Advisory Committee (NPSPAC) to involve parties interested in public safety in the planning effort. Then, in May 1987, following issuance of NPSPAC's *Initial Report*,[4] the Commission released a *Notice of Proposed Rule Making* [5] *(Notice)* proposing rules and policies looking toward the establishment of a National Plan for Public Safety (National Plan). Recognizing that the spectrum needs of public safety agencies differ to some extent throughout the country, the Commission proposed the establishment of regional planning committees to develop plans designed to meet the individual and joint communications needs of public safety agencies within that region. Following the receipt of extensive comments on this proposal as well as NPSPAC's *Final Report*, received on September 9, 1987, the Commission released its *Report and Order* setting forth its National Plan for Public Safety on December 18, 1987.

4. The Commission's *Report and Order* endorsed the regional planning concept proposed in the *Notice* and recommended by NPSPAC as the best method for assuring that the new spectrum allocation is used nationwide as efficiently as possible. To this end, the Commission established fifty-five (55)[6] regions that encompassed all the land area of the United States, including Puerto Rico and the U.S. Virgin Islands. The Commission instructed each region to develop a plan for use of the newly allocated spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the region. Additionally, the Commission established various procedural and substantive requirements for each regional plan but, at the same time, invested considerable discretion in each area to decide how the public safety spectrum should be used to meet the present and future needs of state and local public safety authorities. The Commission's goal, in this regard, was to provide the various regions with the autonomy necessary to be able to design and construct systems that would meet the unique communications needs of their public safety agencies.

5. After each plan is completed and approved by its regional planning committee, it must be submitted to the Chief, Private Radio Bureau and the Chief Engineer. The plan is then placed on public notice and comments are solicited for a 45-day period. The two Bureaus jointly review each plan in conjunction with any comments submitted. After the review process, if the Bureaus determine that a plan is deficient in any of the required elements or if problems are identified by the comments, the plan is returned to the regional planning committee for further work. Once the two Bureaus have formally accepted a plan, the individual public safety entities can begin applying for licensing in the new 800 MHz spectrum.

III. THE CHICAGO METROPOLITAN AREA REGION PLAN

6. Region 54 comprises forty-three counties within the four States of Wisconsin, Illinois, Indiana and Michigan and represents the geographic area surrounding the southern tip of Lake Michigan.[7] On August 10, 1989, the Chicago Metropolitan Area, Region 54, submitted its plan to the Commission for review and approval. Although the Region 54 Plan provides a frequency assignment plan and a basis for evaluating and accommodating future applicants, on September 11, 1989, Region 54 submitted a letter amending its plan to include a statement that sufficient frequencies are available to satisfy all of the applicants' needs in the region at the time of filing the plan.

7. Specifically, the plan provides a summary of its major elements, including application review and evaluation criteria, guidelines followed for spectrum utilization, system design, data transmission, use of cellular technology and mobile satellite, and interoperability including implementation of the mutual aid channels. In a general description of how the spectrum is to be allotted among the various eligible users within the region, the plan describes the algorithm it has adopted to maximize spectrum efficiency. The plan explains how the current and future needs of all entities within the region were determined in a survey conducted in 1988. The plan points out

that while the number of frequencies projected to be needed appears to be high, the number of actual applicants at this time is low. Plan at 12. Using the information it collected, population figures and expected continuing urbanization of the outlying areas in the Southern Lake Michigan Region, the regional planning committee asked C.E.T., Inc. to generate a channel-specific table using a computerized frequency sorting process designed to achieve a high degree of spectrum efficiency and a low probability of co-channel and adjacent channel interference. The Chicago Metropolitan Area Plan makes 435 proposed channel assignments on the 235 channels in the 821-824/866-869 MHz band.[8] Each county received a minimum of five channels, those with a population in excess of 240,000 receiving more. The City of Chicago received 20 channels. The four State governments were assigned 66 channels: six for all four State governments, 30 for Wisconsin and Indiana, and 30 for Illinois and Michigan. An additional seven channels were assigned to the Primary Zone Pool which is defined in the plan as those counties with an excess demand for spectrum.[9] Plan at 19.

8. The plan states that it was coordinated with the four adjacent regions, Wisconsin, Illinois, Indiana, and Michigan. The chairmen of the four adjacent regions, all of whom served on the Chicago Metropolitan Area Regional Planning Committee, expressed their full support for the plan in their letters of coordination. Copies of these letters are included with the plan.

IV. COMMENTS

9. The Region 54 Plan was placed on Public Notice for comments on August 23, 1989.[10] We received no comments in response to the Public Notice.

V. DISCUSSION

10. We have reviewed the plan submitted for Region 54, as amended, and find that it conforms with the National Public Safety Plan and includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112. The Regional Planning Committee has made a reasonable and good faith effort to satisfy the Commission's requirements. The absence of comments in this proceeding confirms our conclusion that the plan reasonably accommodates the mobile communications needs of the public safety and special emergency agencies in the region.

VI. CONCLUSION

11. We recognize the effort that went into preparing the Region 54 Plan and commend the Regional Planning Committee for its work. The Chicago Metropolitan Area presented a challenge because of the size of its population and its multi-state composition. We are pleased to see how Region 54 designated primary and secondary zones within its borders to account for the disparity between urban and rural areas, and placed much stricter requirements on the primary zones. We believe the Region 54 Plan represents a careful balance of the public safety and special emergency mobile communication needs throughout the area and will result in efficient use of the newly allocated 800 MHz Public Safety radio spectrum.

12. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 54 IS ACCEPTED. Accordingly, licensing of the 821-824/866-869 MHz bands may commence immediately in Region 54.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

FOOTNOTES

[1] Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987).

[2] We accepted the New York (Region 8) Public Safety Plan on May 12, 1989, 4 FCC Rcd 4457 (1989), the North Central and North East Texas (Region 40) Public Safety Plan on June 22, 1989, 4 FCC Rcd 5401 (1989), and the Southern California (Region 5) Public Safety Plan on November 8, 1989.

[3] *See* Federal Communications Commission Authorization Act of 1983, December 8, 1983, P.L. 98-214, 97 Stat. 1467, Section 9(a).

[4] NPSPAC, Initial Report To the Federal Communications Commission, *published in* Appendix B, Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869, 2873-92 (1987) (*Initial Report*).

[5] Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869 (1987).

[6] The Report and Order established 48 Regions. This number and the boundaries were amended by Memorandum Opinion and Order, 3 FCC Rcd 2113 (1988).

[7] The forty-three counties are Winnebago, McHenry, Cook, Kane, Kendall, Grundy, Boone, Lake, Dupage, De Kalb, Will, and Kankakee, Illinois; Kenosha, Milwaukee, Washington, Dodge, Walworth, Jefferson, Racine, Ozaukee, Waukesha, Dane, and Rock, Wisconsin; Lake, La Porte, Jasper, Starke, St. Joseph, Porter, Newton, Pulaski, Marshall, and Elkart, Indiana; and Ottawa, Kent, Van Buren, Kalamazoo, Barry, Muskegon, Allegan, Berrien, Cass, and St. Joseph, Michigan.

[8] These figures do not include the five channels set aside for mutual aid in accordance with the National Plan.

[9] Cook, DuPage, Land and Kane, Illinois; Lake, Indiana; and Milwaukee, Wisconsin.

[10] 54 FR 35061 (August 23, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 13, 1989

ONA Joint Conference Releases
Separations Data Request
(CC Docket 88-2)

The Federal/State Joint Conference on Open Network Architecture (ONA) released a separations data request on December 1, 1989. The data request seeks data regarding investment and expenses for Common Channel Signalling Network (CCSN), Integrated Services Digital Network (ISDN), and packet switching. The data request also solicits information regarding the relation of CCSN, ISDN, and packet switching to ONA, and the current separations methodology for these technologies. The data request asks the BOCs, as well as other interested local exchange carriers, to provide complete responses for all of the data requested on or before February 1, 1990, approximately 60 days from release of the data request. State and federal staff, in conjunction with industry representatives, are currently preparing guidelines for submission of the requested data, which will be available as soon as they are completed. A copy of the data request, along with responses to the data request, will be filed in CC Docket 88-2.

The Joint Conference serves as an ongoing forum for state/federal cooperation to facilitate the development and implementation of ONA. The Joint Conference was established in the Federal Communications Commission's *BOC ONA Order* (4 FCC Rcd 1 (1989)). Three FCC Commissioners and thirteen state commissioners serve as Conference members.

For further information contact Steven Gorosh, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047, or Sarah Lawrence, Office of Public Affairs, at (202) 632-5050.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic

Offer of Comparably Efficient
Interconnection to Providers
of Data Processing Services

MEMORANDUM OPINION AND ORDER

Adopted: December 4, 1989; Released: December 13, 1989

By the Chief, Common Carrier Bureau:

1. On June 6, 1989, pursuant to the requirements established in the *Computer III* proceeding,[1] Bell Atlantic filed a comparably efficient interconnection (CEI) Plan to provide a variety of data processing and storage services.[2] No one filed comments, and in this Order, we approve the Plan.

I. THE PLAN

A. Service Description

2. Under the Plan, "Bell Atlantic proposes to offer timesharing services, facilities management services and other data processing and storage services through computer systems owned by Bell Atlantic, or by its customers." [3] In addition, the Plan proposes to offer an "electronic vaulting" service which allows storage of customer information on Bell Atlantic's computer system[4] for use in the event that the customer's computer system fails.[5] Bell Atlantic expects its data processing services to be used by a variety of customers who cannot practically retain in-house data processing capabilities.[6]

3. Bell Atlantic plans to provide these data processing and storage services through computer systems separate from those used in the provision of basic telephone services.[7] Bell Atlantic also states that since it proposes to conduct its data processing services through non-telephone company entities, it has no present plans for the telephone companies to provide billing and collection services in connection with those activities.[8]

B. Proposed CEI Arrangements

4. Bell Atlantic states that its enhanced storage and data processing services "will use only existing basic network services at full rates with no 'short loop' or other discount."[9] Bell Atlantic adds that the underlying basic services which it will use to provide its storage and data processing services are currently available on an unbundled basis.[10] Bell Atlantic also states that it will use basic network services only where they are available to other ESPs.[11] Bell Atlantic adds that information concerning the geographic availability and the tariff status of each underlying basic service is contained in an appendix to its filing. Bell Atlantic also states that "[c]ustomer access to the basic services underlying Bell Atlantic's data processing services and those underlying a comparable competitor's service will be identical."[12]

5. Bell Atlantic states that interconnection to its enhanced services will be through standard published interfaces,[13] and adds that the basic services offered to enhanced service competitors will be equal in quality to those used by Bell Atlantic for its data processing services.[14] Bell Atlantic states that the underlying basic services "which [it] will use to provide its data processing services and which customers may use to access these services are available to all users for any lawful purpose."[15] Bell Atlantic also states that it will use the installation, maintenance and repair procedures that the Commission approved in its ONA Plan.[16] Bell Atlantic adds that it will comply with the requirement that it minimize transport costs by charging affiliated and unaffiliated ESPs the same rate for all underlying basic services.[17]

C. Other Nonstructural Safeguards

6. Bell Atlantic states that it will continue to use its current installation and maintenance nondiscrimination reporting procedures until the revised reporting procedures, contained in its amended ONA plan, become effective.[18] Bell Atlantic states that initially it will use the procedures for implementing customer proprietary network information (CPNI) requirements described in its original ONA Plan.[19] Bell Atlantic states that it will implement the revisions to its CPNI procedures contained in its May 19, 1989 filing when they are approved.[20] In addition, Bell Atlantic states that it will allocate joint and common costs according to its Cost Allocation Manual.[21] Bell Atlantic states that it does not intend to implement any changes to existing network interface specifications in connection with the provision of these enhanced services, but adds that it will comply with network disclosure requirements if any new interfaces are added.[22]

II. DISCUSSION

7. We approve Bell Atlantic's CEI Plan for the data processing and storage services described herein. Bell Atlantic states that it will comply with each of our CEI parameters as well as our other non-structural safeguards. Its offerings will also satisfy the CEI pricing requirements.

III. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, Bell Atlantic's CEI Plan for data processing and storage services described herein, IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Commission's decision in *Computer III* requires a Bell Operating Company (BOC) that wishes to offer an enhanced service on an unseparated basis prior to implementation of a comprehensive Open Network Architecture (ONA) Plan to submit and obtain approval of a CEI plan for the specific service, or class of services, it proposes to offer. *See* Amendment of Sections 64.702 of the Commission's Rules and Regulations, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *appeals pending sub nom.* California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1988) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988).

[2] Bell Atlantic has requested a waiver of the Modification of Final Judgment line of business restrictions to allow provision of these services. Request of Bell Atlantic for a Waiver of Section II (D) of the Modification of Final Judgment to Provide Data Processing Services, Civil Action No. 82-0192 HHG, U.S. v. Western Electric Co., Inc. and American Telephone and Telegraph Co.

[3] Plan at 2-3 (footnotes omitted).

[4] This service enables customers to transmit to Bell Atlantic, through telephone lines or by magnetic tape, information which the customer runs on his own computer system. *Id.* at 3.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 2.

[8] *Id.* at 4.

[9] Bell Atlantic states that if its enhanced services use any deregulated basic services or basic services available on an individual case basis, it will issue a notice showing the rates Bell Atlantic is paying. The Plan specifies that ESPs contacting Bell Atlantic will be placed on a mailing list to receive such notices. *Id.* at 4, n. 9. Bell Atlantic used similar procedures in its CEI plan for protocol conversion services. Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Protocol Conversion Services, 4 FCC Rcd 2744 at 2746, para. 21 (1989).

[10] Plan at 5.

[11] *Id.* at 2.

[12] *Id.* at 6.

[13] *Id.* at 2.

[14] *Id.* at 5.

[15] *Id.* at 7.

[16] *Id.* Bell Atlantic must also comply with any revisions to these procedures.

[17] *Id.* at 6-7.

[18] *Id.* at 8.

[19] *Id.*

[20] *Id.* at 9.

[21] *Id.* at 7.

[22] *Id.* at 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Competitive Telecommunications
Association,
ITT Communications Services, Inc.
Complainants.
v. File No. E-89-394

United Telephone
Company of Missouri,
Defendant.

ERRATUM

Released: December 13, 1989

The order in the above captioned proceeding, DA 89-1481, adopted November 14, 1989, released November 24, 1989, IS CORRECTED to change the first paragraph to read as follows:

1. On September 27, 1989, Competitive Telecommunications Association and ITT Communications Services, Inc. (hereinafter collectively referred to as "Complainants") filed a formal complaint against United Telephone Company of Missouri (hereinafter referred to as "United of Missouri") alleging an excessive earned rate of return for interstate switched traffic sensitive access service for the period of October 1, 1985 to December 31, 1986.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 1781

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: December 5, 1989; Released: December 6, 1989

By the Chief, Common Carrier Bureau:

1. On September 8, 1989, American Telephone and Telegraph Company (AT&T) filed Transmittal 1781. This transmittal eliminates AT&T's dial station rate program which enables college students to place calls at discounted rates from dormitory telephones located at seven colleges in the United States. On September 25, 1989, MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 1781 (MCI Petition); AT&T replied on September 28 (AT&T Reply). This transmittal is scheduled to become effective on December 7, 1989.

2. Under AT&T's current Tariff F.C.C. No. 1, students with billing identification numbers are charged the dial station rate for operator-assisted MTS calls placed from dormitory telephones. By Transmittal 1781, AT&T seeks to eliminate this arrangement, and its customers, if they choose to continue using AT&T, would have to place Calling Card or Operator-Handled Calls.

3. MCI alleges that AT&T's proposed discontinuance of its Dial Station class of service calls is unlawful because AT&T has failed to obtain Commission certification to discontinue the service in accordance with Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), and Section 63.62(f) of the Commission's Rules, 47 C.F.R. § 63.62(f). MCI Petition at 2. MCI argues that even if AT&T were to dispute MCI's characterization of Transmittal 1781 as a proposal to discontinue service, AT&T could not deny that the proposal constitutes a reduction of service that has an adverse impact on the public and thus would still require certification under Section 63.62(f) of the Rules. *Id.* MCI also maintains that AT&T's letter notification to those schools affected by Transmittal 1781 violates the Act and the Rules because it is the students at the dormitories, not the universities, who are adversely affected by this change and they have not been notified by AT&T. Finally, MCI notes that AT&T will gain $287,000 from its service reduction or discontinuance.

4. AT&T states that MCI's characterization of Transmittal 1781 as a proposal to discontinue service is wrong. AT&T acknowledges that affected students will now pay a non-discounted (higher) rate but asserts that a change in rates does not constitute a discontinuance or a reduction in service which requires Commission certification. AT&T Reply at 2. According to AT&T, the United States Court of Appeals has held that the elimination of a rate discount is not a discontinuance as long as the underlying service remains, albeit at different rates. *Id.*, citing *Aeronautical Radio, Inc. v. F. C. C.*, 642 F. 2d 1221, 1233 (D.C. Cir. 1980). AT&T argues that this proposal will not impair customers' ability to place MTS calls but will only eliminate a billing arrangement. *Id.* at 3. AT&T does not admit to a gain of $287,000 but instead explains that this amount is merely an estimate and does not reflect any projected loss of service from customers who choose to refrain from making calls. *Id.* at 2 n.*.

5. The Common Carrier Bureau has reviewed the tariff transmittal, the petition filed by MCI and AT&T's reply. We find that no compelling argument has been presented that the tariff is patently unlawful so as to require rejection.

6. IT IS THEREFORE ORDERED that the petition against the American Telephone and Telegraph Tariff F.C.C. No.1, Transmittal No. 1781, filed by MCI Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 8, 1989

ANNOUNCEMENT OF REVIEW OF ARTICLE XIV(d) OF THE INTELSAT AGREEMENT

In October 1989, the Fifteenth INTELSAT Assembly of Parties considered improvements to the procedures and guidelines for assessment of the potential for significant economic harm applied in consultations regarding separate satellite systems under Article XIV(d) of the INTELSAT Agreement. The Assembly called for an integrated, systematic, and timely review of Article XIV(d), noting that the underlying objective of Article XIV(d) is to ensure the economic health and viability of INTELSAT so that it can continue to discharge its prescribed functions and responsibilities.

The Assembly also tasked the Board of Governors to join in the review paying special attention to the broad policy considerations involved, including:

> (i) the impact of any proposed changes upon the ability of the Organization to meet its obligations under the Agreement and to provide for global interconnectivity and non-discriminatory access, including particularly the policy implications of maintaining a globally uniform tariff structure;
>
> (ii) the appropriate role of Parties and Signatories in achieving the objectives of the Organization as a commercially viable entity.

The Assembly decided to consider this review as a matter of the highest priority at its next ordinary meeting in October 1990. The Board of Governors will be completing a report to the Assembly at its September 1990 meeting based on work done at its December 1989, March 1990, and June 1990 meetings.

As a first step in this effort, the Director General of INTELSAT has submitted to the Board a proposed outline (BG-83-41) of the scope and approach for this review of the long term application of Article XIV(d). This document, BG-83-41, is available for public inspection in Room 533, 1919 M St., N.W., Washington, D.C.

Members of the public wishing to comment on the issues raised in the outline should do so in writing no later than January 12, 1990. Reply comments should also be submitted no later than January 26, 1990. The comments filed will be considered by the U.S. Party to INTELSAT in developing U.S. positions on these issues.

Parties should submit their comments as follows. The original and three copies should be sent to the Office of Assistant Bureau Chief/International, Common Carrier Bureau, Room 534, Federal Communications Commission, Washington, D.C. 20554, for inclusion in the public file in the Common Carrier Bureau International Reference Room. (Because of the informal nature of this mechanism, parties need not file copies with the Secretary of the FCC). In addition, a copy is to be forwarded to the Office of International Affairs, National Telecommunications and Information Administration, Room 4701, 14th and Pennsylvania Avenue, N.W., Washington, D.C. 20230 and to Bureau of International Communications and Information Policy, U.S. Department of State, CIP/REG, Washington, D.C. 20520.

For further information contact Joel Pearlman at (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-591

In the Matter of

Amendment of Section 73.202(b), RM-6467
Table of Allotments,
FM Broadcast Stations.
(Fruithurst, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 29, 1989; Released: December 14, 1989

By the Chief, Allocations Branch:

1. At the request of Steven L. Gradick (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 693 (1989), proposing the allotment of Channel 274A to Fruithurst, Alabama, as that community's first local broadcast service. Petitioner filed comments stating his intention to apply for the channel, if allotted. No other comments were received.

2. Channel 274A can be allotted to Fruithurst, Alabama, in compliance with the Commission's minimum distance requirements, provided the transmitter is sited at least 2.9 kilometers (1.8 miles) west[1] to avoid short-spacing to Station WVRK(FM) Channel 275C, Columbus, Georgia,[2] as well as Station WVEE(FM), Channel 277C, Atlanta, Georgia. [3]

3. We believe the public interest would be served by allotting Channel 274A to Fruithurst, Alabama, since it could provide the community with its first local broadcast service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 29, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Fruithurst, Alabama	274A

4. The window period for filing applications will open on **January 30, 1990,** and close on **March 1, 1990.**

5. For further information concerning this proceeding, contact Ordee Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the restricted site for Channel 274A are 33-43-57 and 85-28-06.

[2] Since the *Notice* in this proceeding issued, the licensee of Channel 275C, Columbus, Georgia, has changed its call sign from WNKS(FM) to WVRK(FM).

[3] Coordinates at the licensed site of Station VEE(FM) are 33-45-35 and 84-20-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-572

In the Matter of

Amendment of Section 73.202(b), RM-7020
Table of Allotments,
FM Broadcast Stations.
(Canaan, Vermont)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1989; Released: December 14, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration a petition for rule making filed by Four Seasons Communications, Inc. ("petitioner"), requesting the substitution of Channel 231C3 for Channel 231A at Canaan, Vermont, and the modification of its construction permit for Station WKQC(FM) to specify operation on the higher class co-channel. The proposal could provide the community and the surrounding area with an expanded FM service. Petitioner states it will apply for the channel, if allotted.

2. Channel 231C3 can be allotted to Canaan in compliance with the Commission's minimum distance separation requirements at Station WKQC(FM)'s current transmitter site specified in the construction permit.[1] Since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

3. As requested, we shall propose to modify the construction permit for Station WKQC(FM), Channel 231A at Canaan, Vermont, to specify operation on the higher class co-channel, Channel 231C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Canaan.

4. We believe the public interest could be served by the proposed substitution of Channel 231C3 for Channel 231A at Canaan, Vermont. Accordingly, in order to provide Canaan with a first expanded FM service, the Commission seeks comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Canaan, Vermont	231A	231C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 5, 1990,** and reply comments on or before **February 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Timothy D. Martz, President
Four Seasons Communications, Inc.
P.O Box 36
Fairfield, CT 06430
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 45-01-20 and 71-25-05 at a site located 9.6 kilometers (6 miles) northeast of the city.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-571

In the Matter of

Amendment of Section 73.202(b), RM-7033
Table of Allotments,
FM Broadcast Stations.
(Benton, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1989; Released: December 14, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Stonewood Communications Corporation ("petitioner"), seeking the allotment of Channel 226A to Benton, Tennessee, as that community's first local FM service. Petitioner states its intention to apply for the channel either by itself or as part of another entity, if allotted. Channel 226A can be allotted to Benton in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Benton could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Benton, Tennessee	---	226A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **February 5, 1990,** and reply comments on or before **February 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Stanley G. Emert, Jr., Esquire
Lockridge & Becker, P.C.
Post Office Box 107
Knoxville, TN 37901
(Counsel for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] A site restriction of 0.9 kilometers (0.6 miles) southwest of the city is required in order to avoid a short spacing to Station WCKS(FM), Channel 226A, Karns, Tennessee. The coordinates are 35-09-54 and 84-39-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-570

In the Matter of

Amendment of Section 73.202(b), RM-7061
Table of Allotments,
FM Broadcast Stations.
(Lafayette, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1989; Released: December 14, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Ivan Davis ("petitioner"), seeking the allotment of Channel 281A to Lafayette, Tennessee, as that community's first local FM service. Petitioner states his intention to apply for the channel, if allotted. Channel 281A can be allotted to Lafayette in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Lafayette could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lafayette, Tennessee	---	281A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **February 5, 1990,** and reply comments on or before **February 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Timothy K. Brady, Esquire
Post Office Box 986
Brentwood, TN 37027-0986
(Counsel for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The city reference coordinates are 36-31-24 and 86-01-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-569

In the Matter of

Amendment of Section 73.202(b), RM-7025
Table of Allotments,
FM Broadcast Stations.
(Belle Chasse, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1989; Released: December 14, 1989

By the Chief, Allocations Branch:

1. At the request of First Belle Chasse Media Group ("petitioner"), the Commission considers herein a petition for rule making requesting the substitution of Channel 275C3 for Channel 275A at Belle Chasse, Louisiana, and the modification of its construction permit for Channel 275A at Belle Chasse to specify operation on the higher class channel. Petitioner expresses an interest in applying for the channel, if allotted.

2. The channel substitution can be accomplished consistent with the Commission's minimum distance separation requirements at the site specified by the petitioner.[1] Therefore, as requested we shall propose to modify the construction permit for Channel 275A at Belle Chasse, Louisiana, to specify operation on Channel 275C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Belle Chasse.

3. In view of the fact that the area surrounding Belle Chasse, Louisiana, could receive additional wide coverage area FM service, we believe it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Belle Chasse, Louisiana	275A	275C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 5, 1990,** and reply comments on or before **February 20, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

David D. Oxenford, Esquire
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D. C. 20037
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Petitioner specified a desire to utlize a site located 9.2 kilometers (5.7 miles) east of Belle Chasse, Louisiana. The coordinates are 29-52-06 and 89-53-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-552

In the Matter of

Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services	RM-6595

NOTICE OF PROPOSED RULE MAKING

Adopted: November 28, 1989; Released: December 15, 1989

By the Commission: Commissioner Quello issuing a separate statement.

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INTRODUCTION

1. On September 6, 1988, we issued a *Report and Order* in General Docket No. 87-14 (*Allocation Order*) [1] reallocating the 220-222 MHz band from the fixed, land mobile, and amateur services solely for private and federal government land mobile use.[2] In the *Allocation Order*, we indicated that we would establish service rules for the newly-allocated band in another proceeding. [3] On November 21, 1988, we received a Petition for Rule Making (UPS Petition) filed on behalf of United Parcel Service of America, Inc. (UPS). The UPS Petition urges that we initiate a rule making to establish those service rules and sets forth proposals that UPS believes will optimize spectrum efficiency in the band. We are issuing this *Notice of Proposed Rule Making* for the purpose of proposing service rules for the band and inviting comments on the proposals.

THE PLEADINGS

UPS Petition for Rule Making

2. In its Petition, UPS notes the ever-increasing demand for channels for the Private Land Mobile Radio Services (PLMRS). UPS also points out that one objective in reallocating the 220-222 MHz band was to provide spectrum to allow for development of narrowband technologies and thus diminish the future spectrum requirements of PLMRS licensees.[4] UPS states that the rules it proposes will promote the development of such technologies, meet the immediate need of PLMRS licensees for additional spectrum, and maximize flexibility to meet varied operating requirements.[5]

3. In general terms, UPS proposes that the 220-222 MHz band be divided into two hundred 5 kHz channel pairs. UPS also proposes that there be no restrictions on access to any of the frequencies based on eligibility under the subparts of Part 90 of our Rules.[6] Rather, UPS proposes that the two hundred channels be divided into twenty 10-channel blocks, with six blocks set aside for nationwide and local assignments to single licensees for a period of two years from the date we begin accepting applications.[7] The remaining channels, pursuant to the UPS proposal, would be available for assignment in twenty 5-channel trunked groups and forty individual or "conventional" channels.[8]

4. Under the UPS proposal, the nationwide channel blocks and thirty-five conventional channels would be set aside exclusively for data use for a period of two years from the date we begin accepting applications.[9] UPS further proposes that the nationwide channel block assignments be made only after a comparative analysis of all

interested and qualified applicants.[10] According to UPS, all licensees would be subject to specified loading requirements. UPS suggests, however, that data and voice mobiles count differently toward the satisfaction of loading requirements to account for the greater efficiencies of data over voice operations.[11] UPS also proposes license terms of ten years, at least for nationwide licensees.[12]

5. From a technical standpoint, UPS proposes to establish a maximum transmitter effective radiated power (ERP) of 500 watts and an antenna height above average terrain (HAAT) of 500 feet, resulting in a 70 mile co-channel base station separation.[13] According to the UPS proposal, permissible ERP would be reduced as the HAAT increases to maintain a constant protected coverage contour.[14] Additionally, UPS proposes standards for equipment frequency stability and suggests a transmitter "emission mask" to minimize adjacent channel interference.[15]

Comments on the Petition

6. On December 7, 1988, we issued a *Public Notice* asking for comment on the UPS Petition. Five parties filed comments on the Petition.[16] Of the commenting parties, only one objects to the UPS Petition as a whole. ARRL, a non-profit association representing amateur radio operators, argues that the UPS Petition is premature because of pending petitions for reconsideration of the *Allocation Order* [17] and because the Commission has not coordinated procedures for sharing the spectrum with the federal government, which, under the *Allocation Order*, also has access to the 220-222 MHz band.[18] ARRL therefore, contends that the Commission should dismiss the UPS Petition.[19]

7. On the other hand, ATA, a trade association representing the trucking industry, supports the UPS Petition in its entirety. ATA states that adoption of rules such as those proposed by UPS will lead to the development of low-cost narrowband equipment and create the necessary incentives to ensure continued innovation.[20] In this regard, ATA points especially to the UPS proposals to establish nationwide and local channel blocks and permit licensees of these blocks to experiment with channelization even smaller than 5 kHz.[21]

8. The other three commenting parties also generally praise the UPS efforts to encourage expeditious implementation of service rules for the 220-222 MHz band. These commenters, however, while agreeing with some aspects of the UPS Petition, also criticize certain of the UPS proposals. Counter to the UPS proposal, for example, AAR and FIT urge the Commission to divide frequencies in the 220-222 MHz band into pools, with assignments to eligible users coordinated pursuant to the existing frequency coordination process.[22] They object to the UPS proposal to set aside six channel blocks for local and nationwide assignment. They argue, in this respect, that such a set-aside, combined with the frequencies the federal government is entitled to use, would leave very little spectrum for other land mobile communications requirements.[23] AAR and FIT also object to the UPS suggested data set-aside on the grounds that narrowband data technology is not yet proven and that, in any event, the marketplace should determine whether land mobile users turn to voice, data, or other communications methodologies to satisfy their communications needs.[24] Finally, AAR and FIT object to the UPS proposed ten-year license term, arguing that the current five-year term helps the Commission maintain an accurate data base by removing from its records the substantial number of land mobile frequency assignments that have not been activated or have been discontinued.[25]

9. SEA, the only party commenting on the UPS band plan and technical standards, agrees with the proposal to divide the band into two hundred 5 kHz channel pairs.[26] SEA expresses concern, however, that the band plan and suggested emission mask leave a potential for interference.[27] SEA also disagrees with the proposal to use certain channels for data only, arguing that the ability to mix data and voice has been proven in the 800/900 MHz bands.[28]

DISCUSSION

10. We stated in the *Allocation Order* that spectrally efficient technologies will be essential in meeting this country's future land mobile requirements.[29] Thus, as the UPS Petition points out, we reallocated the 220-222 MHz band to the private land mobile service not only to help meet the immediate need of land mobile operators for additional spectrum but also with the intention of affording spectrally efficient narrowband technology an opportunity to develop and gain acceptance in the marketplace.[30] In developing service rules for use of the band by land mobile operators, it is imperative that we incorporate provisions that will accomplish both goals.

11. The UPS proposals, in general, promote the objectives of our *Allocation Order*. They combine extensions of existing policies and concepts with new, untried approaches to accomplish objectives that the current regulatory framework may not always fulfill. In the discussion that follows, we will set forth the UPS proposals on an issue by issue basis. We will also explain possible modifications of or alternatives to those proposals in cases where we believe such modifications or alternatives might result in the adoption of rules that would better serve the needs of a majority of operators in the PLMRS and the needs of the public. We ask commenters to discuss the benefits or problems they see in all proposals presented under each issue and, when they believe it is appropriate, to suggest other specific alternatives. Because of the large number of issues, we have subdivided our discussion into four sections. The first section discusses issues concerning channelization. The second section addresses licensing procedures, while the third section concerns conditions of license. The last section addresses specific technical issues. We request that comments be structured to follow the same general format.

I. *Channelization*

12. *Channel Bandwidth*. UPS suggests, and other commenters agree, that the 220-222 MHz band be divided into two hundred 5 kHz channel pairs, with corresponding transmit and receive frequencies separated by 1 MHz.[31] All channels would consist of paired frequencies; there would be no simplex channels. Dividing the band into two hundred 5 kHz paired channels is consistent with our objective of providing spectrum for the development of spectrally efficient narrowband land mobile radio systems. We therefore propose a channelization plan based upon two hundred 5 kHz channel pairs. *See* paragraphs 24-34, *infra*.

13. *Pools*. UPS proposes that we not restrict access to any of the frequencies in the 220-222 MHz band based on eligibility under Subparts B-E of Part 90 of our Rules.[32]

As noted above, other commenters urge that we divide the band into suballocations for the Business, Other Industrial, Land Transportation, and Public Safety Radio Services.[33] We propose, however, to make most frequencies in the 220-222 MHz band available to any person or entity eligible under Subparts B-E of Part 90 of our Rules and to let market forces determine how much spectrum will be utilized by various types of users. We have, in the past, found it difficult to gauge which users most need the spectrum and how much spectrum should be allocated to each group of users. For example, in some cases when we have used the pool concept, frequencies allocated to Specialized Mobile Radio licensees have been quickly depleted in certain areas while other frequencies in the same areas remain unused. This result is spectrally inefficient. Furthermore, a primary purpose of reallocating the 220-222 MHz band to the land mobile service is to promote the development of narrowband technology. Any Part 90 eligible willing to commit the necessary resources to implement such systems should have access to the spectrum without regard for subpart eligibility. We ask for comment on our proposal to refrain from creating pools. We especially seek comment on the question of whether, at a minimum, we should set aside frequencies (and what amount would be necessary) for the Public Safety Radio Services, since the needs of those services are generally not tied to market forces. Concerning this issue, we also seek comment on the extent to which Public Safety Radio Service licensees would be likely to invest in the development and implementation of narrowband systems.[34] Additionally, we ask whether the sharing of the 220-222 MHz band with the Federal Government would facilitate the establishment of a joint government/non-government system for mutual public-safety requirements and whether this would warrant a separate set-aside.

14. We do, however, see some benefit in using the pool concept to provide Part 90 eligibles the opportunity to satisfy their needs by establishing their own systems. Therefore, we propose to designate some of the nationwide channels as "non-commercial" to meet the internal communications needs of the licensee itself. *See* paragraph 18, *infra*. We also propose to bar commercial operations from the individual channels for five years. At the end of the five year period, private carriers will be free to apply for unoccupied frequencies or be assigned existing non-commercial systems for commercial use. We seek comment on the desirability of this time-limited set-aside for non-commercial operations.

15. *Nationwide and Local Set - Asides*. UPS proposes that six blocks of ten contiguous channels be made available as nationwide and local assignments to individual licensees for a period of two years after we begin accepting applications. Four of the channel blocks would be reserved for nationwide data operations. The remaining two channel blocks would be available for data or voice operations on a local basis, with applicants free to group together channels or channel blocks in geographically contiguous areas to create regional systems.[35] UPS argues that these proposed set-asides are essential to the development of narrowband technologies, because the research and testing necessary to develop the systems will require considerable financial resources. Nationwide assignments in particular, UPS contends, will give licensees with large scale needs for private land mobile services the assurance that they will be able to implement the technologies they develop on the scale required to meet their needs and thus give them the incentive to fund such research and testing. Under the UPS proposals, after the initial two-year period, all unassigned frequencies in the nationwide and local channel blocks would be available as single channel assignments.[36]

16. We have, in the past, granted nationwide licenses where such grants would expedite delivery of a new and innovative service to the public.[37] Reservation of some of the 220-222 MHz band channels for nationwide assignment may promote improvements in narrowband technologies. Nationwide assignments could, for instance, provide incentives to licensees with substantial land mobile requirements to invest the resources necessary to employ the most spectrally efficient means of meeting those requirements. Furthermore, nationwide land mobile systems will permit entities with extensive land mobile requirements a high degree of flexibility, both geographically and operationally. Without a specific set-aside, establishing such systems will be impractical or, more likely, impossible. Under our existing licensing schemes, it is difficult for a land mobile operator to patch together a nationwide service. The applicant must obtain numerous individual authorizations and, possibly, use different frequencies throughout the nation. The initial grant of a license to operate nationwide on the same set of frequencies is clearly a surer and much less burdensome alternative. We therefore propose to set aside channels for nationwide assignments.

17. As noted in paragraph 4 *supra*, UPS proposes that we set aside the nationwide channel blocks for data use only for a period of two years. We believe, however, that the plan for nationwide assignments should be more flexible than that proposed by UPS. While we see the public interest benefits in ensuring the expeditious development of data technology, *see* paragraphs 22-23 *infra*, we do not agree that the channel blocks reserved for nationwide applicants should also be reserved for data operations only. Rather we propose to permit both data and voice operations on the nationwide channels.

18. Instead of creating four nationwide channel blocks of ten contiguous channels each, as UPS proposes, we propose to create two blocks of ten contiguous channels and eight blocks of five contiguous channels for nationwide use. Both 10-channel blocks as well as two of the 5-channel blocks will be available only to non-commercial nationwide licensees (*i.e.*, licensees who will build and operate the nationwide system for their own internal purposes only). Four of the 5-channel blocks will be reserved for nationwide commercial applicants.[38] The other two 5-channel blocks will be reserved for nationwide Government use. This approach will accommodate the broadest possible range of land mobile requirements. There will be spectrum available for entities with the resources to develop and implement systems tailored to their own expansive needs and there will also be spectrum available for commercial carriers to establish systems that can provide a nationwide service to meet the various and diverse requirements of a number of entities. Furthermore, by providing both 5 and 10-channel non-commercial blocks, applicants will be able to select the amount of capacity more closely reflecting their needs. Finally, by providing nationwide blocks for Government use, federal agencies such as the Federal Bureau of Investigation and Department of Justice will be able to establish communications systems useful for purposes such as nationwide drug enforcement.

19. Finally, also in contrast to the UPS proposal, we do not anticipate making unassigned nationwide frequencies available as individual channel assignments at the end of two years. The spectrum will be reserved for nationwide assignment until further Commission action. Narrowband technology is still not the standard mode of operation and the concept of nationwide licensing is relatively new in the private land mobile radio services. A two year set-aside may therefore be insufficient to ensure that land mobile operators who could benefit from a nationwide system will have time to plan and implement their systems.

20. We seek comment on all aspects of our proposed nationwide allocation, including comment on whether a nationwide set-aside is in the public interest, whether the allocated channels should be for data use only or for data and voice operations, whether it is appropriate to make assignments in both 10-channel and 5-channel blocks, and whether it is appropriate to make some blocks available to non-commercial users only and other blocks to commercial private carriers only. Regarding non-commercial nationwide licensees, we also seek comment on whether they should be permitted to share excess capacity on a not-for-profit basis or to sell or lease that capacity, and, if so, what conditions or limitations should apply to the licensees' use of their authorized channels.

21. UPS, as noted, proposes allocating two blocks of ten contiguous channels for local use.[39] As we understand UPS' use of the word "local" in its submissions, we cannot identify a specific need for these local blocks apart from the single channels UPS proposes. There seems to be no reason to complicate the allocation scheme with the designation of some channels as "local." Applicants can put together local systems by applying for single channels or for trunked channels in contiguous geographic areas.[40] We are interested, however, in receiving comment from those who believe that allocating certain channels for "local" use only would be in the public interest and how a "local/regional" channeling plan might be constructed without greatly complicating the licensing and spectrum management process.

22. *Data Set - Aside*. To stimulate the development of narrowband data technologies, UPS proposes that four 10-channel blocks reserved for nationwide systems and thirty-five conventional channels be set aside exclusively for data use for a period of two years after we begin accepting license applications. UPS points out that development of data technologies is in the public interest because data transmissions are much more spectrally efficient than voice transmissions.[41] Yet, UPS urges, if we do not set aside some spectrum for use by licensees willing to refine existing narrowband data technologies, the 220-222 MHz band will probably all be claimed for voice operations. UPS observes, in this regard, that narrowband voice technologies are currently more highly developed than data technologies and the demand for voice channels is not decreasing.[42]

23. Several commenters argue that a data-only reservation is inappropriate and that the marketplace should determine whether land mobile users turn to voice, data, or other communications methodologies to satisfy their communications needs.[43] Data technology, however, does offer improvements in spectrum efficiency over voice technology.[44] Therefore, it is in the public interest to provide some incentive for the development of that technology. To this end, we propose to set aside thirty individual channels exclusively for data use for a period of ten years from the date that we begin accepting applications.[45] This extended timeframe may be necessary for full development and introduction of data technology in the 220-222 MHz band. We also propose that, for purposes of the data only set-aside, the term "data" refer to analog non-voice transmissions or to any digital transmission, voice or non-voice. We view this definition as appropriate because voice and non-voice information, when converted to digital transmission, appear as a digital data stream, and are much more analogous to data than to analog voice transmission. We request comments on any aspects of our data set-aside proposal, including the duration of the set-aside and the definition of data.

24. *Channeling Plans*. As discussed in the preceding paragraphs, we concur with UPS that the 220-222 MHz band should be divided into two hundred 5 kHz channel pairs. We also concur generally that certain channels should be set aside for nationwide allocations and for use by data systems, though there are significant differences in the specifics of our proposals and those suggested by UPS. While we have identified a preferred channeling plan, for discussion purposes we have also set forth several alternative plans, each having a somewhat different emphasis on spectrum usage. In all of the plans, each channel consists of a frequency pair, with transmit and receive frequencies separated by 1 MHz. Channel 1 is centered at 220.0025 MHz (base)/221.0025 MHz (mobile), Channel 2 is 5 kHz higher at 220.0075/221.0075, etc., until Channel 200 at 220.9975/221.9975 MHz.[46]

25. Table 1 contains our preferred narrowband plan. This plan divides the band into five and ten channel blocks (sixty channels) for use by non-commercial and commercial non-government nationwide systems and for Government nationwide systems. It designates one hundred channels specifically for trunked systems. It provides ten individual channels for voice and/or data systems and thirty individual channels for data only systems.[47] Our preferred plan is therefore the basis for the proposed rules contained in the attached Appendix.

Table 1 - Preferred Band Plan (Grouped Plan)

Group No.	Channel No.		Use
1	01 - 31 -		
.	61 - 91 - 121		(20) 5-channel trunked groups, voice, data
.			
20	20 - 50 - 80 - 110 - 140		
	21-30	10 channel block	Non-Government, nationwide, non-commercial, voice, data
	51-60	"	"
	81-85	5 channel block	"
	86-90	"	"
	111-115	"	Government, nationwide
	116-120	"	"
	141-145	"	Non-Government, nationwide, commercial, voice, data
	146-150	"	"
	151-155	"	"
	156-160	"	"
	161-170	Individual channels	Voice, data
	171-200	"	Data only

26. An alternative narrowband plan, shown in Table 2, which does not include specific channels for trunked systems, is also under consideration. This plan includes two 10-channel blocks and eight 5-channel blocks (sixty channels) for nationwide systems, sixteen 5-channel blocks (eighty channels), and sixty individual channels, with thirty for voice and/or data use and thirty for data use only.[48]

Table 2 - Alternative I Band Plan (Block Plan)

Channel No.		Use
01-10	10 channel block	Non-Government, nationwide, non-commercial, voice, data
11-20	"	"
21-25	5 channel block	"
26-30	"	"
31-35	"	Non-Government, nationwide, commercial, voice, data
36-40	"	"
41-45	"	"
46-50	"	"
51-55	"	Voice, data
56-60	"	"
61-65	"	"
66-70	"	"
71-75	"	"
76-80	"	"
81-85	"	"
86-90	"	"
91-95	"	"
96-100	"	"
101-105	"	"
106-110	"	"
111-115	"	"
116-120	"	"
121-125	"	"
126-130	"	"
131-135	"	Government, nationwide
136-140	"	"
141-170	Individual channels	Voice, data
171-200	"	Data only

27. As described above and as illustrated in the Tables, the primary difference between these two narrowband plans is the grouping of non-contiguous channels for trunking in the first plan versus the block approach in the second plan. We prefer the first plan because of our desire to encourage trunking, a technology that increases spectrum efficiency, especially for land mobile voice operations. While our second plan does not preclude the use of trunking technology, we recognize that to introduce this technology on contiguous narrowband channels may be less viable or desirable from both a technical and economic standpoint. The second alternative does, however, offer licensees greater flexibility to use a 5-channel block for any type of system, including 5-channel trunked, multi-channel conventional, and multi-channel data.[49]

28. In addition to the plans set out above, we also solicit comments on an additional alternative that designates part of this spectrum for narrowband voice and data use and part for digital data communications. Our current private land mobile allocations set aside considerable spectrum for voice and voice/data communications, but relatively few frequencies are reserved exclusively for non-voice (non-paging) data communications.[50] Most data systems in operation today use radio equipment designed for voice operations. Advances in equipment technology, however, now enable data systems to become more efficient. To achieve the efficiencies possible with newly developed data transmission techniques, dedication of some spectrum solely for systems using these techniques would appear appropriate, if not necessary. We view as inevitable the shift towards more non-voice communications, both because of the efficiency compared to voice and because computer-to-computer information transfer will become

an increasingly common form of radio communications. Accordingly, the 220-222 MHz band could be a valuable resource for accommodating such future data communications needs. UPS emphasizes the growing reliance on and importance of data communications in its request for channels to be set aside for such use.

29. The concepts important to achieving spectral efficiency with voice communications are different from those associated with data communications. Voice communications are dependent upon a "frequency division" environment, where the spectrum is divided into as many discrete channels as possible. Narrowband technologies provide a way to reduce the spectrum consumed by voice signals, with single sideband and amplitude compandered single sideband voice channels being on the order of 3-5 kHz wide. Trunking of voice channels is a technique used to optimize a user's access to available voice channels. Only one voice communication, however, is on any one voice channel at a given time, thus necessitating the availability of a vacant channel to initiate a new voice communications link.

30. Data transmission efficiency, however, is not enhanced by bandwidth reductions, *per se*. Data efficiency is measured in terms of "bit rate" per Hertz (Hz) of spectrum utilized. For a given signaling technology, the bit rate is generally proportional to the channel bandwidth. Doubling of the bandwidth allows a doubling of the bit rate and thus doubles the rate at which information can be transmitted. The "baud rate", which is the typical term used to denote signaling speeds for computer-to-computer communications, is equal to the bit rate for 2-level modulation systems. For 4-level systems, the bit rate is twice the baud rate. Signals using standard 1200 and 2400 baud rates are now used to modulate VHF FM transmitters with 16F3 emissions inside a 25 kHz radio channel. These same signaling rates can be achieved by using direct digital modulation within a 5 kHz bandwidth. Therefore, spectrum efficiency can be improved not only by reducing the bandwidth of a channel, but also by changing the modulation scheme.

31. We propose in this latter alternative to designate one megahertz for narrowband voice and data operations (consistent with our plans described above) and one megahertz for digital modulation systems. Both portions of the band would be sub-divided into one hundred 5 kHz paired channels with transmit and receive frequencies separated by 1 MHz. The voice and data portion (Channels 1-100) designates one 10-channel and two 5-channel blocks for non-Government nationwide non-commercial systems, two 5-channel blocks for non-Government nationwide commercial systems, six 5-channel blocks plus thirty individual channels for voice or data systems and two 5-channel blocks for Government nationwide systems. The other portion (Channels 101-200) designates one hundred 5 kHz channels specifically for digital transmissions. Table 3 below sets forth this alternative.

Table 3 - Alternative II Band Plan (Digital Plan)

Channel No.		Use
01-10	10-channel block	Non-Government, nationwide, non-commercial, voice, data
11-15	5-channel block	"
16-20	"	"
21-25	"	Non-Government, nationwide, commercial, voice, data
26-30	"	"
31-35	"	Voice, data
36-40	"	"
41-45	"	"
46-50	"	"
51-55	"	"
56-60	"	"
61-65	"	Government, nationwide
66-70	"	"
71-100	Individual channels	Voice, data
101-200	"	Digital

This band plan incorporates aspects from each of the above two plans, thus permitting the licensing of all Part 90 applicants now requiring digital data-only communications and those desiring spectrum to utilize narrowband voice or data radio links.

32. Although digital transmissions would contribute to increased spectrum efficiency, there may be several digital techniques that could be employed. Packet transmission technology[51], for example, is a very efficient mode of operation, and it could be in the public interest to require this technique to be used. We ask, therefore, whether we should require its use or some similar digital technology format under this alternative. Because we have not proposed specific rules to reflect the requirement to use any particular digital technology, and we indeed may need more information before we can do so, we may not be in a position to adopt this aspect of this alternative at the conclusion of the comment period for this *Notice*. We, therefore, solicit comments on the technical standards needed to enable packet or other similar digital technology to be used in this band for the provision of private land mobile radio services.

33. For this alternative, the rules and procedures would be consistent with those applicable to the other plans discussed in this *Notice*. For the digital channels on which packet radio systems could be employed to accommodate multiple simultaneous users, there may no longer be a need for nationwide, trunked, block, and individual assignments. Although this portion of the band would be divided into discrete channels, applicants for these channels would be band-licensed to operate on all of the digital channels. Use of all channels would therefore be on a shared basis by all licensees authorized to operate in this portion of the 220-222 MHz band. There would be no exclusivity, consequently no co-channel mileage reuse criteria. We would, however, limit power and antenna height for base stations as discussed for the previous alternatives. There would be no construction or loading requirements, and licenses would be granted for 5 year renewable periods.

34. Essentially, this alternative incorporates both approaches used in Part 90 to govern the use of spectrum allocated to the private land mobile radio services. That is, the licensing approach for half of the 220-222 MHz band

would be on an exclusive assignment basis, whereas the other half would be on a shared basis. Following the concept discussed in footnote 58 herein, the Commission would initially coordinate non-government applications for frequencies in the narrowband voice and data portion of the spectrum. Coordination of the packet digital data frequencies would not be required because of the proposed band-licensing concept as mentioned in the previous paragraph. We request that commenters address in detail the specifics of each plan described above as well as the differences between them. Additionally, we ask that commenters describe what they view as the attributes, both positive and negative, of the three plans.

II. ***Licensing Procedures***

35. *Government / Non - Government Sharing of the Spectrum.* As stated earlier, the 220-222 MHz band was reallocated to the land mobile service for both Government and non-Government operations. We are currently working with the National Telecommunications and Information Administration (NTIA) to determine the procedure to be followed in sharing the spectrum with Government users. Generally, we propose that Government and non-Government users share the spectrum on a co-equal basis. We propose, however, to reserve two of the 5-channel nationwide blocks for Government use only.[52] NTIA indicates that several Government agencies, including the Federal Bureau of Investigation, Department of Justice, and Department of Energy, have identifiable nationwide communications needs which this set-aside should help satisfy. NTIA, of course, will have full responsibility for licensing on the channels reserved for Government use, as well as for all aspects of regulating use of those channels. We propose, however, that after five and ten years from the adoption of a *Report and Order* in this proceeding, NTIA and the Commission will review the situation to determine whether the Government channels are being used efficiently and, if not, whether and how the channels should become available to non-Government applicants. This determination will be made using construction standards similar to the ones that we adopt for non-Government nationwide licensees. *See* paragraphs 46-52, *infra*. We invite comment on all aspects of our proposal for Government, non-Government sharing of the spectrum.

36. *Selection Process.* Because of the limited number of frequencies available, UPS urges that nationwide assignments be made only after a comparative analysis of all interested and qualified applicants. UPS proposes that all nationwide applicants must first demonstrate that they are financially and technically qualified to conduct the necessary research and build the system proposed. UPS urges that the Commission then evaluate qualified applicants by considering factors such as the number and population of Metropolitan Statistical Areas (MSAs) that the applicant proposes to serve, the number of base stations that will be constructed and the number of mobiles that will be loaded during the license term, the need for the system in the geographic area specified, and the spectrum efficiency of the system.[53] UPS does not indicate criteria for comparing spectrum efficiency or need for the system among the various applicants.

37. The use of comparative hearings to select among mutually exclusive applicants has posed a continuing problem for the Commission in certain circumstances. Not only can a process in which applicants are evaluated by numerous and complicated comparative criteria become lengthy and expensive, but it may not necessarily result in the award of a license to the applicant who will best serve the public interest. Thus, even in situations where the number of anticipated applications is relatively limited, the minimal benefits that might result from a comparative hearing may be outweighed by the cost and delay of service associated with the hearing process. Therefore, the use of a lottery process to make license selections is often a preferable alternative.[54]

38. While there may be circumstances that warrant the use of comparative hearings, such is not the case here. In the instant situation, if we use comparative hearings, we would have to develop new comparative criteria. This process would be extremely difficult and, indeed, could result only in identifying "distinctions without meaningful material differences."[55] For example, it is not clear how we could accurately judge the "spectrum efficiency" of proposed systems or the "need" for these systems, two comparative criteria proposed by UPS. On the other hand, we hope to encourage early introduction of spectrally efficient technologies by licensees on the 220-222 MHz band. The lottery process can help us in this regard whereas applying hearing procedures could delay the licensing and implementation of narrowband systems.

39. Therefore, we propose the following procedure for processing applications for all non-nationwide and for non-Government nationwide assignments in the 220-222 MHz band. We will announce in our final *Report and Order* in this proceeding or by separate *Public Notice* when applications will be accepted for filing.[56] We propose to grant applications on a first-come, first-served basis with mutual exclusivity dependent on the date on which applications are filed.[57] We will conduct lottery proceedings pursuant to 47 C.F.R. § 1.972 when mutually exclusive applications are filed on the same day.[58]

40. *Entry Criteria.* UPS does not suggest nor do we propose to establish entry requirements for applicants seeking non-nationwide allocations in the 220-222 MHz band. As discussed above, however, UPS urges that we require nationwide applicants, as a threshold matter, to demonstrate that they are financially and technically qualified to build a nationwide system.[59] UPS does not make specific suggestions as to what would constitute an adequate showing of these qualifications.

41. Frequencies available for nationwide assignment will be limited. We need to establish entry criteria to ensure that all potential licensees intend to construct a nationwide system and that they have the resources to implement their proposal. The criteria we propose are designed to be as flexible as possible to achieve this goal and, at the same time, permit maximum eligibility for the allocations. The criteria will apply to all non-Government nationwide applicants, both commercial and non-commercial. As stated, NTIA will handle all applications for Government nationwide channels. *See* paragraph 35, *supra*.

42. First, we propose to require that each nationwide applicant certify that, within the initial ten-year term of license,[60] it will build and have in operation at least one base station in seventy of the top one hundred MSAs and that it submit a ten-year construction schedule describing the system in detail.[61] This level of construction and operation is the minimum that would constitute sufficient use of the designated nationwide channels.

43. Second, we propose to require that each nationwide applicant demonstrate that it has sufficient financial resources to construct the system proposed. To this end, we propose to require that the nationwide applicant file with the application an itemized estimate of the costs of constructing and operating for ten years the system proposed. The applicant must also submit with the application either proof of available assets sufficient to cover estimated costs or a firm financial commitment from a lender for funds sufficient to cover the costs. We propose to require that applicants intending to rely on personal or internal resources submit financial statements certified within one year of the date of the application showing net current assets sufficient to meet estimated costs. They must also submit a balance sheet dated no more than sixty days before the date of the application showing the continued availability of sufficient net current assets.[62] Applicants relying on a firm financial commitment from a lender must submit evidence that the lender has examined the financial condition of the applicant and determined it creditworthy and evidence that the lender has examined the proposed system and is willing to provide the necessary financing based solely on its relationship with the applicant.[63] The lender must be a *bona fide* commercially acceptable source, *e.g.*, a state or federally chartered bank or savings and loan association, other recognized financial institution, financial arm of a capital equipment supplier, or investment banking house.[64]

44. By requiring applicants to satisfy these requirements, we intend to minimize the filing of speculative applications by entities that have no real intention to implement a nationwide system. We request comment, however, on the effect of the proposed financial showing on applicants in general and on small businesses in particular. We also request comment on the question of whether we should attempt to establish a minimum benchmark figure to use in determining whether an applicant has fairly estimated the costs of constructing and operating a nationwide system and therefore whether his current assets or loan commitment are sufficient. Finally, we seek comments on whether the proposed seventy base station minimum is adequate to demonstrate and ensure efficient and effective use of the spectrum.

III. *Conditions of License.*

45. *License Term.* Pursuant to our existing rules applicable to PLMRS licensees, licenses are granted for a term of five years.[65] Generally speaking, we see no reason to extend the license term that applies to PLMRS licensees from that set forth under existing rules. Therefore, we are proposing a five-year license term for all non-nationwide licensees in the 220-222 MHz band. UPS suggests, however, and we concur, that nationwide licensees will need a significant period of time to implement their systems. Therefore, we are proposing a ten-year license term for these licensees.[66] For all licensees, we propose to issue licenses only after type accepted equipment for the 220-222 MHz band is available. [67]

46. *Construction Periods; Loading Requirements.* UPS proposes exclusive channel assignments[68] coupled with construction periods, loading requirements, and take-back procedures for nationwide licensees. Specifically, UPS proposes that within five years of receiving a license, the nationwide licensee must construct at least two base stations in each of the top twenty MSAs, one base station in at least seventy of the top one hundred MSAs, and a total of one hundred base stations in at least thirty states. For any base station that is counted towards meeting these requirements, UPS proposes that the licensee must load at least fifty data mobiles on the base station within one year of base station operation. Also, within five years of complete system construction, as described above, UPS proposes that the licensee must have two hundred-fifty data mobiles per channel in locations where conventional channels are exhausted. If the licensee does not meet this requirement and an applicant can demonstrate that no channels are available for a base station, UPS proposes that the licensee must give back 5 kHz of his allocation.[69]

47. For all licensees except nationwide licensees, we propose a twelve month construction period. For non-Government nationwide licensees, we propose to establish a ten-year construction period that will be subdivided into four "benchmark" periods, with penalties for the licensee's failure to meet certain requirements at each benchmark date.[70] NTIA will adopt similar criteria for the use of the Government nationwide channel blocks. *See* paragraph 35, *supra*.

48. As stated in paragraph 42 *supra*, each non-Government nationwide applicant must certify in his application that, within ten years of receiving a license, he will construct a minimum of one base station in at least seventy of the top one hundred MSAs. We propose to require, as a condition of license, that the licensee construct base stations in at least 10% of the markets designated in his application within two years of licensing, in at least 40% of the markets designated within four years of licensing, in at least 70% of the markets designated within six years of licensing,[71] and in all designated markets within ten years of licensing.[72] We will require the licensee to file a progress report at the conclusion of each "benchmark" period to inform the Commission of the status of the proposed system.[73]

49. We propose that the nationwide licensee lose the entire license and that the nationwide block allocation be available for reassignment as a nationwide license if, at the end of either the two or four-year periods, the licensee has not met the 10% and 40% construction benchmarks, respectively. The licensee will, however, be given a "grace period" of six months to convert to non-nationwide channels, if such channels are available. If at the end of the six and ten year periods the licensee has not met the 70% and 100% levels, the licenses for the unbuilt facilities will cancel automatically in areas where the licensee has failed to construct and channels will become available as non-nationwide assignments on a channel-by-channel, area-by-area, basis. Under this circumstance, we also propose to grant exclusivity to the nationwide licensee's existing facilities using a co-channel separation of 120 kilometers.[74]

50. We are proposing that all licensees receive exclusive use of their channels and that they not be required to meet loading standards to retain their licenses.[75] The concept of channel exclusivity without loading requirements on spectrum that is unused is somewhat unique. As part of our recent consolidation of Subparts M and S in Part 90 of our Rules, we determined that the Specialized Mobile Radio (SMR) industry no longer required loading standards as an incentive to make efficient use of licensed facilities. As a result, we decided to phase out our requirement that SMR licensees load their channels with a set number of mobiles within a given timeframe, or risk cancellation of their license for the unloaded channels.[76]

Notably, though, that decision was largely premised on the maturity of the SMR industry, where there is now an inherent incentive to load a system once it has been constructed. Although operations in the 220-222 MHz band will bear some resemblances to operations above 800 MHz in that we plan to make exclusive allocations and permit commercial operations, use of the band remains untried. As a result, an argument could be made that imposition of loading standards would help ensure that this new allocation is used efficiently, and by those with a genuine need for the spectrum.

51. We also recognize that the incentives to make efficient use of constructed facilities may not necessarily be as strong for non-commercial licensees as for commercial licensees. A commercial licensee or private carrier is dependent upon its ability to load a system with mobiles in order to operate a successful business. The same cannot be said of a Non-commercial licensee who has no incentive to load his system beyond what will best meet his own communications needs. A non-commercial licensee may, therefore, find his own profitability maximized by a lightly loaded system. From this perspective the spectrum is not being put to optimal use.

52. We tentatively conclude, however, that a licensee who is required to construct a system (or lose its authorization) will have an incentive to build and capitalize on the investment by loading the system rather than keep it idle or underutilized. We ask for comments on whether construction is sufficient to promote efficient use of the spectrum; whether we should adopt some form of loading requirement; and if so, what form should the loading requirements take and to whom should they apply. We also ask for comment on the alternative of setting aside some channels for shared use, with or without loading standards, and on the alternative of making all of the spectrum available for shared use with exclusivity based on a loading/usage standard.

53. *Permissible Uses*. To maximize channel usage, we are proposing that permissible uses of channels in this band include base/mobile and mobile relay transmissions on a primary basis, and fixed voice and signaling transmissions on a secondary basis. Because there are other frequency bands available for paging operations, we propose not to license paging-only in this band. UPS proposed certain modifications to the Automatic Vehicle Monitoring (AVM) rules contained in Section 90.239 of the Rules. Because channels in the 220-222 MHz band will be authorized on an exclusive basis, a licensee may utilize its frequencies for AVM operations, if desired.

IV. *Technical Considerations*

54. *Geographic Separation Requirements*. As described in the UPS Petition, a technical problem with the paired channels in the 220-222 MHz band is that the lower half of the band (220-221 MHz) is immediately adjacent to the upper half (221-222 MHz).[77] If base transmitting frequencies were assigned to the lower half (in the upper part of the 220-221 MHz band) and mobile transmitting (base receiving) frequencies assigned to the upper half (in the lower part of the 221-222 MHz band), interference would exist between those base transmitters and base receivers operating with close geographic spacing on close frequency spacing in the vicinity of 221 MHz. Therefore, UPS suggests and we propose that the band be divided into three sub-bands and that we require geographic spacing between co-channel stations operating in certain sub-bands.[78] Sub-band A includes Channels 1-60, Sub-band B includes Channels 141-200, and Sub-band C includes Channels 61-140. To minimize interference, Sub-band A base station receivers could not be co-located with Sub-band B base station transmitters, but must be geographically separated, as detailed below.[79]

Geographic Separation of Sub-band A Base Station Receivers and Sub-band B Base Station Transmitters

Separation distance kilometers	Effective radiated power, watts[80]
0.0 - 0.3	0
0.3 - 0.5	5
0.5 - 0.6	10
0.6 - 0.8	20
0.8 - 2.0	25
2.0 - 4.0	50
4.0 - 5.0	100
Over 5.0	200

55. *Co - channel Base Station Separation*. Because we propose to assign exclusive licenses, a standard on which to base such exclusivity is necessary. To this end, we are proposing a "maximum size" base station facility to be one that transmits an effective radiated power (ERP) of 200 watts peak envelope power at a height above average terrain (HAAT) of 90 meters. This should be sufficient to provide a service area with radius of about 35 kilometers and will permit 120 kilometer reuse of the frequency. These distances correspond to those in the *Second Report and Order*, Docket 18262, 46 FCC 2d 774 (1974) at note 26. We are also proposing a maximum mobile power of 20 watts ERP. These figures should enable private land mobile licensees to obtain quality service without sacrificing spectrum efficiency concerns.

56. At HAATs in excess of 90 meters, to maintain consistency in our distance separation assumptions, we propose that the permissible ERP decrease in accordance with the following:

Equivalent Power and Antenna Heights

Antenna height above average terrain (HAAT), meters	Effective Radiated power, watts[81]
Up to 90	200
90 to 120	100
120 to 150	75
150 to 200	50
200 to 275	25
Above 275	20

57. We disagree with UPS that different standards are necessary for operation in urban or mountainous areas. Recent advances in transmitter synchronization techniques facilitate operations at secondary sites, thus reducing the need for high-power, high elevation stations to obtain adequate coverage. We would, however, continue to permit secondary sites that may be necessary to provide fill-in coverage. We request comments on this as well as the above technical parameters.

58. *Emission Mask.* UPS proposes a transmitter power spectral density emission mask designed to minimize energy spillover into adjacent channels and thus avoid a coordination requirement for transmitters on adjacent channels. The emission mask proposed by UPS requires no emission attenuation for frequencies up to 1.8 kHz offset from the center of the authorized channel. Attenuation of emissions for frequencies offset beyond 1.8 kHz from the center of the authorized channel would increase until frequencies that are 2.5 kHz offset are attenuated by 70 dB and attenuation for frequencies beyond 2.5 kHz offset from the center of the authorized channel would increase until frequencies 5 kHz and more removed are attenuated by 80 dB. Lacking definitive information at this time, we are proposing to utilize this emission mask for all systems regardless of the modulation technique utilized. However, because there was concern in the comments that the mask was overly restrictive and would result in uneconomical equipment, we are requesting comments on the feasibility of adopting a less restrictive mask that would enable adjacent channel operation with minimal interference. We have also proposed specific measurement requirements and request comments on them as well as suggested alternatives.

59. *Frequency Tolerance.* UPS proposes a frequency tolerance of ±0.0001% for base stations and ±0.00015% for mobile and portable units operating in this band. The comments agreed that these tolerances were reasonable from an economic and a performance standpoint. We are therefore proposing these frequency tolerances for equipment in the 220-222 MHz band.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

60. The Commission proposes to establish service rules for use of the 220-222 MHz band by private land mobile licensees. The proposed rules will establish the regulatory framework that is necessary before the Commission can license land mobile operators on the band, thereby relieving their immediate need for additional spectrum. The proposed rules are also intended to promote the development and use of spectrally efficient technologies, including narrowband technology, in order to help meet the future need for land mobile spectrum.

Legal Basis

61. The proposed action is authorized under Sections 4(i), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 332(a).

Reporting, recordkeeping and other compliance requirements

62. Nationwide licensees will have to file progress reports on designated benchmark dates in order to keep the Commission informed of their progress in constructing the system they proposed in their applications.

Federal rules which overlap, duplicate, or conflict with this rule.

63. None

Description, potential impact, and number of small entities affected.

64. Although it is too early to estimate the total effect of these proposals, we anticipate that the overall effect on small entities will be favorable. The proposals will provide the necessary framework for making additional spectrum available to all land mobile operators immediately. They are also intended to promote the development of spectrally efficient technologies that will benefit all land mobile operators in the future by maximizing use of available spectrum. Finally, under certain proposals, private carriers will be permitted to offer nationwide service on a for-profit basis, thus serving the need of small businesses that have nationwide land mobile requirements but are not financially able to establish their own nationwide system.

Any significant alternative minimizing the impact on small entities and consistent with the stated objectives.

65. All significant alternatives have been addressed in the *Notice*. Further, this item is intended to minimize the regulatory burdens to our licensees, many of whom may be considered small business entities.

PAPERWORK REDUCTION ACT STATEMENT

66. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and contain new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and may increase burden hours imposed on the public. Implementation of new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act. The benefit will be that entities capable of and wanting to construct communications systems for use by the public would be selected rather than speculators who would hold the licenses and allow the spectrum to lie fallow awaiting the highest bidder.

PROCEDURAL MATTERS

67. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda periods. *See generally* 47 C.F.R. § 1.1206.(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

68. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the

proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

69. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. §1.1206.

70. Authority for issuance of the *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **March 15, 1990** and reply comments on or before **April 26, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

It is proposed to amend 47 C.F.R. Part 90 as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Section 4, 303, 48 Stat., as amended, 1066,1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. The following Sections of 47 C.F.R. Part 90 are amended by adding the frequency band 220-222 MHz at the appropriate location in the Table of Frequencies contained in each Section, and adding limitations to be numbered and worded as indicated below.

47 C.F.R. §§			
90.17(b) and (c)	Add 220-222 MHz to Table and		limitation (4)
90.19(d) and (e)	"	"	(4)
90.21(b) and (c)	"	"	(17)
90.23(b) and (c)	"	"	(19)
90.25(b) and (c)	"	"	(23)
90.53(a) and (b)	"	"	(8)
90.63(c) and (d)	"	"	(26)
90.65(b) and (c)	"	"	(17)
90.67(b) and (c)	"	"	(37)
90.69(b) and (c)	"	"	(13)
90.71(b) and (c)	"	"	(10)
90.73(c) and (d)	"	"	(37)
90.75(b) and (c)	"	"	(44)
90.79(c) and (d)	"	"	(27)
90.81(c) and (d)	"	"	(1)
90.89(b) and (c)	"	"	(22)
90.91(b) and (c)	"	"	(20)
90.93(b) and (c)	"	"	(16)
90.95(c) and (d)	"	"	(19)

All limitations above read - "Subpart T contains rules for assignment of frequencies in the 220-222 MHz band."

3. 47 C.F.R. § 90.149 is amended by revising paragraph (a) and adding a new paragraph (c) to read as follows:

§ 90. 149 License term.

(a) Except as indicated in paragraph (c) below, licenses for stations authorized under this part will be issued for a term not to exceed five years from the date of the original issuance, modification or renewal.

* * * * *

(c) Nationwide authorizations under Subpart T will be issued for a term not to exceed ten years from the date of the original issuance, modification or renewal.

4. 47 C.F.R § 90.175 is amended by adding paragraph (f)(14) to read as follows:

§ 90. 175 Frequency coordination requirements.

* * * * *

(f) * * *

(14) Applications for frequencies in the 220-222 MHz band.

5. 47 C.F.R. § 90.205 (b) is amended by revising the table as follows:

§ 90. 205 Power.

* * * * *

(b) * * *

Frequency range (MHz)	Maximum output power (watts)	Maximum effective radiated power(ERP) (watts)
* * * * *		
216 to 220	([3 4])	([4])
220 to 222	---	200([12])
222 to 470	([3 5]) 350	---
* * * * *		

([12]) Transmitter peak envelope power shall be used to determine ERP.

* * * * *

6. 47 C.F.R. § 90.209 is amended by revising paragraph (j) and adding paragraphs (l) and (m) to read as follows:

§ 90. 209 Bandwidth limitations.

* * * * *

(j) Except as indicated in paragraphs (l) and (m) below, for transmitters that operate on channels spaced 5 kHz apart (see § 90.271), the power of any emission shall be attenuated below the peak envelope power (P) in accordance with the following schedule:

* * * * *

(l) For transmitters that operate on 5 kHz channel assignments in the 220-222 MHz frequency band, the power of any emission shall be attenuated below the power of the highest emission contained within that channel in accordance with the following schedule:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 1.8 kHz up to and including 2.5 kHz: At least $100(f_d - 1.8)$ decibels.

(2) On any frequency removed from the center of the authorized bandwidth by more than 2.5 kHz up to and including 5 kHz: At least $70 + 4(f_d - 2.5)$ decibels.

(3) On any frequency removed from the center of the authorized bandwidth by more than 5 kHz: At least 80 decibels.

(4) Emission power shall be measured in peak values.

(5) The resolution bandwidth of the instrumentation used to measure the emission power is as follows: 100 Hz for measuring emissions up to (and including) 5 kHz from the center of the authorized bandwidth, and 10 kHz for measuring emissions more than 5 kHz from the center of the authorized bandwidth. The power level of the highest emission within the channel, to which the attenuation is referenced, shall be remeasured for each change in resolution bandwidth.

(m) For transmitters that operate on 25 kHz (5-channel) or 50 kHz (10-channel) contiguous channel assignments in the 220-222 MHz band, the power of any emission shall be attenuated below the power of the highest emission contained within the authorized bandwidth in accordance with the following schedule:

(1) On any frequency removed from the edge of the authorized bandwidth up to, but not including, 2.5 kHz: At least 70 decibels.

(2) On any frequency removed from the edge of the authorized bandwidth by 2.5 kHz or more: At least 80 decibels.

(3) The authorized bandwidth is equal to 5 kHz multiplied by the number of channels employed by the transmitter.

(4) Emission power shall be measured in peak values.

(5) The resolution bandwidth of the instrumentation used to measure the emission power is as follows: 100 Hz for measuring emissions up to (and including) 2.5 kHz from the edge of the authorized bandwidth and 10 kHz for measuring emissions more than 2.5 kHz from the edge of the authorized bandwidth. The power level of the highest emission within the channel, to which the attenuation is referenced, shall be remeasured for each change in resolution bandwidth.

7. 47 C.F.R. § 90.211 (d)(2) is amended by adding references to § 90.209 (l) as follows:

§ 90. 211 Modulation requirements.

* * * * *

(d) * * *

(2) Transmitters subject to the emission limitations of paragraphs (f), (g), (h), (j), (l), or (m) of § 90.209 shall be exempt from the audio low-pass filter requirements of this section, provided that transmitters used for digital emis-

sions must be type accepted with the digital modulating signal or signals specified by the manufacturer. The type acceptance application shall contain such information as may be necessary to demonstrate that the transmitter complies with the emission limitations specified in paragraphs (f), (g), (h), (j), (l), or (m) of § 90.209.

8. 47 C.F.R. § 90.213 is amended by adding footnote 18 to the 50-450 MHz band in the Frequency Tolerance Table as follows:

§ 90.213 Frequency tolerance.

(a) ***

Frequency Tolerance

* * * * *

50-450 [5 6 17 18].0005 [5 6 17 18].0005 [5 17 18].0005 [7 17 18].005

* * * * *

(18) In the 220-222 MHz band, base stations shall maintain the carrier frequency to within ±0.0001 per cent, and mobiles shall maintain the carrier frequency to within ±0.00015 per cent.

9. 47 C.F.R. § 90.233 is amended by revising paragraph (c) to add a reference to Subpart T as follows:

§ 90. 233 Base / mobile non - voice operations.

* * * * *

(c) Provisions of this section do not apply to authorizations for paging, telemetry, radiolocation, AVM, radioteleprinter, radiofacsimilie, radio call box operations, or authorizations granted pursuant to Subpart T.

10. 47.C.F.R. § 90.238 is amended by removing "Reserved" and adding text to paragraph (f) to read as follows:

§ 90. 238 Telemetry operations.

* * * * *

(f) 220-222 MHz as available under Subpart T.

* * * * *

11. 47 C.F.R. § 90.243 is amended by adding a sentence to the end of paragraph (a)(1) to read as follows:

§ 90. 243 Mobile relay stations.

(a) * * *

(1) * * * Mobile relay operations will be authorized in the 220-222 MHz band.

* * * * *

12. 47 C.F.R. § 90.419 is amended by revising paragraph (a) to read as follows:

§ 90. 419 Points of communication.

* * * * *

(a) Base stations licensed under Subpart T and those in the Public Safety and Special Emergency Radio Services that operate on frequencies below 450 MHz, may communicate on a secondary basis with other base stations, operational fixed stations, or fixed receivers authorized in these services.

* * * * *

13. 47 C.F.R. § 90.425 is amended by adding paragraph (d)(8) to read as follows:

§ 90. 425 Station identification.

* * * * *

(d) * * *

(8) It is a base or mobile station in the 220-222 MHz band authorized to operate on an nationwide basis in accordance with Subpart T.

14. 47 C.F.R. § 90.555 is amended by adding the 220-222 MHz frequency band to the combined frequency list in paragraph (b).

§ 90. 555 Combined frequency listing.

* * * * *

(b) Combined frequency list

Frequency	Services	Special limitations
	* * * * *	
216-220	IW,IP,IF,IS,IB,IX,IT	Telemetry.
220-222	All Svcs. Exc. RS	See Subpart T.
420-450	RS	See limitations.

* * * * *

15. 47 C.F.R. Part 90 is amended by adding a new Subpart T to read as follows:

Subpart T - Regulations Governing Licensing and Use of Frequencies in the 220 - 222 MHz Band.

§ 90. 701 Scope.

Frequencies in the 220-222 MHz band are available for land mobile use for both Government and non-Government operations. This subpart sets out the regulations governing the licensing and operation of non-Government systems operating in the 220-222 MHz band. It includes eligibility requirements, application procedures, and operational and technical standards for stations licensed in these bands. The rules in this subpart are to be read in conjunction with the applicable requirements contained elsewhere in this part; however, in case of conflicts, the provisions of this subpart shall govern with respect to licensing and operation in this frequency band.

APPLICATIONS FOR AUTHORIZATIONS

§ 90. 703 Eligibility.

The following persons are eligible for licensing in the 220-222 MHz band.

(a) Any person eligible for licensing under Subparts B, C, D or E of this part.

(b) Any person proposing to provide communications service to any person eligible for licensing under Subparts B, C, D or E of this part on a not-for-profit, cost-shared basis.

(c) Any person, except wire line telephone common carriers, eligible under this part proposing to provide on a commercial basis, station and ancillary facilities for the use of federal government agencies and persons eligible for licensing under Subparts B, C, D or E of this part.

§ 90. 705 Forms to be used.

Applications for all radio facilities under this subpart must be prepared on FCC Forms 574 and 574A and must be submitted or filed in accordance with § 90.127.

§ 90. 709 Special limitations on amendment of applications and on assignment or transfer of authorizations licensed under this subpart.

(a) Except as indicated in paragraph (b) below, the Commission will not consent to the following:

(1) Any request to amend an application so as to substitute a new entity as the applicant;

(2) Any application to assign or transfer a license for a non-nationwide system prior to the completion of construction of facilities; or

(3) Any application to transfer or assign a license for a nationwide system before the licensee has constructed at least 40% of the proposed system pursuant to the provisions of § 90.725(a).

(b) The Commission will grant the applications described in paragraph (a) if:

(1) The request to amend an application or to transfer or assign a license does not involve a substantial change in the ownership or control of the applicant; or

(2) The changes in the ownership or control of the applicant are involuntary due to the original applicant's insolvency, bankruptcy, incapacity, or death.

POLICIES GOVERNING THE PROCESSING OF APPLICATIONS AND THE SELECTION AND ASSIGNMENT OF FREQUENCIES FOR USE IN THE 220-222 MHZ BAND

§ 90. 711 Processing of applications.

(a) Applications will be processed on a first-come, first-served basis. When multiple applications are filed on the same day for frequencies in the same geographic area, and insufficient frequencies are available to grant all applications, these applications will be considered mutually exclusive and will be subject to lottery proceeding pursuant to 47 C.F.R. § 1.972.

(b) All applications will first be considered to determine whether they are substantially complete and acceptable for filing. If so, they will be assigned a file number and put in pending status. If not, they will be dismissed.

(c) Except as otherwise provided in this section, all applications in pending status will be processed in the order in which they are received, determined by the date on which the application was received by the Commission in its Gettysburg, Pennsylvania Office (or the address set forth at § 0.401(b) for applications requiring the fees established by Part 1, Subpart G of this chapter).

(d) Each application that is accepted for filing will then be reviewed to determine whether it can be granted. Frequencies will be assigned by the Commission pursuant to the provisions of § 90.723.

(e) An application which is dismissed will lose its place in the processing line.

(f) If an application is returned for correction and resubmitted and received by the Commission within 60 days from the date on which it was returned to the applicant, it will retain its place in the processing line. If it is not received within 60 days, it will lose its place in the processing line.

§ 90. 713 Entry Criteria.

(a) As set forth in § 90.717, two blocks of ten and six blocks of five contiguous channels have been set aside for exclusive assignments for non-Government use on a nationwide basis. The assignment of these frequencies will only be to applicants who:

(1) Certify that, within ten years of receiving a license, they will construct a minimum of one base station in at least 70 of the top 100 MSAs;

(2) Certify that they will meet the construction requirements set forth in § 90.725;

(3) Submit a ten year schedule detailing plans for construction of the proposed system as well as an itemized estimate of the cost of constructing and operating the system during the ten year term of the initial license;

(4) Demonstrate that they have sufficient financial resources to construct and operate the proposed system for the initial ten year term of license; *i.e.*, that they have net current assets sufficient to cover estimated costs or a firm financial commitment sufficient to cover estimated costs.

(b) Applicants relying on personal or internal resources for the showing required in paragraph (a) of this section must submit financial statements certified within one year of the date of the application showing net current assets sufficient to meet estimated construction and operating costs. They must also submit a balance sheet dated no more than sixty days before the date of the application showing the continued availability of sufficient net current assets. The applicant or an officer of the applicant's organization must attest to the validity of the unaudited balance sheet.

(c) Applicants submitting evidence of a firm financial commitment for the showing required in paragraph (a) of this section must obtain the commitment from a *bona fide* commercially acceptable source, *e.g.*, a state or federally chartered bank or savings and loan institution, other recognized financial institution, the financial arm of a capital equipment supplier, or an investment banking house. If the lender is a non-conventional source, the lender must also demonstrate that it has funds available to cover the total commitments it has made. The lender's commitment shall contain a statement that the lender:

(1) Has examined the financial condition of the applicant including, where applicable, audited financial statements, and has determined that the applicant is creditworthy; and

(2) Has examined the financial viability of the proposed system for which the applicant intends to use the commitment; and

(3) Is willing to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction and operation of the system for the initial term of license; and

(4) Is willing to enter into the commitment solely on the basis of the lender's relationship with the applicant.

§ 90. 715 Frequencies available.

(a) The following table indicates the channel designations of frequencies available for assignment to eligible applicants under this subpart. Frequencies shall be assigned in pairs, with base station frequencies taken from the 220-221 MHz band with corresponding mobile and control station frequencies being 1 MHz higher and taken from the 221-222 MHz band. Only the lower half of the frequency pair(s) is listed in the table.

TABLE OF 220-222 MHz CHANNEL DESIGNATIONS

Channel No.	Base Frequency (MHz)
1	220.0025
2	220.0075
. . .	
. . . .	
. . .	
199	220.9925
200	220.9975

(b) The 200 channels are divided into three sub-bands as follows:

Channel No.	Sub-band	Frequencies (MHz)
1-60	A	220.0-220.3/221.0-221.3
61-140	C	220.3-220.7/221.3-221.7
141-200	B	220.7-221.0/221.7-222.0

§ 90. 717 Channels available for nationwide systems in the 220 - 222 MHz band.

Channels 21-30 and 51-60 are 10-channel blocks available to applicants eligible in all Part 90 services only for nationwide non-commercial systems for voice and/or data use. Channels 81-85 and 86-90 are 5-channel blocks available to applicants eligible in all Part 90 services only for nationwide non-commercial systems for voice and/or data use. The term "non-commercial system" is defined as a system that will be used only for a licensee's internal use. Channels 141-145, 146-150, 151-155, and 156-160 are 5-channel blocks available to non-Government applicants only for nationwide commercial systems for voice and/or data use. The term "data", for purposes of this subpart, includes the transmission of text, control codes, and other information typical of machine-to-machine communications. Digitized voice signals are considered data signals under this subpart. Channels 111-115 and 116-120 are 5-channels blocks available for Government nationwide use only.

§ 90. 719 Individual channels available for assignment in the 220 - 222 MHz band.

(a) Channels 161-200 are available to both Government and non-Government applicants. Non-Government access to these channels will be limited to applicants eligible in all Part 90 services for non-commercial operations until March 31, 1995, after which time commercial operations to serve Part 90 eligibles and the Government may be authorized. Channels 161-170 will be available for voice and data operations and Channels 171-200 will be assigned only for data systems. Channels 171-200 will be set aside for data only operations until March 31, 2000.

(b) After March 31, 2000, Channels 171-200 will be assigned singly or in contiguous channel groups for data and/or voice operations.

§ 90. 721 Channels available for trunked systems in the 220 - 222 MHz band.

The channel groups listed in Table 1 are available to both Government and non-Government applicants for trunked-only operations for non-commercial or commercial operations to serve all Part 90 eligibles and the Government.

Table 1 -Trunked Channel Groups

Group No.	Channel Nos.
1	1-31-61-91-121
2	2-32-62-92-122
. . . .	
. . . .	
. . . .	
19	19-49-79-109-139
20	20-50-80-110-140

§ 90. 723 Selection and assignment of frequencies.

(a) Applications for frequencies in the 220-222 MHz band shall specify the number of frequencies requested and whether their intended use is for 5 or 10-channel nationwide systems, commercial or non-commercial use, 5-channel trunked systems, individual data/voice use, or individual data only use. All frequencies in this band will be assigned by the Commission.

(b) Channels will be assigned pursuant to §§ 90.717, 90.719, and 90.721 of this subpart.

(c) Applicants will be assigned only the number of channels justified to meet their requirements. Except for the 10-channel nationwide assignments, the maximum number of frequencies that will be assigned to an applicant at any one time is five.

(d) Base stations utilizing channels assigned from Sub-band A (220.000-220.300 MHz) will be separated from base stations utilizing channels assigned from Sub-band B (220.700-221.000 MHz) as follows:

Geographic Separation of Sub - band A Base Station Receivers and Sub - Band B Base Station Transmitters

Separation distance (kilometers)	Effective radiated power (watts)*
0.0 - 0.3	0
0.3 - 0.5	5
0.5 - 0.6	10
0.6 - 0.8	20
0.8 - 2.0	25
2.0 - 4.0	50
4.0 - 5.0	100
Over 5.0	200

* Transmitter peak envelope power shall be used to determine effective radiated power.

(e) A mobile station is authorized to transmit on any frequency assigned to its associated base station.

(f) Except for nationwide assignments, the separation of co-channel systems will be 120 kilometers.

§ 90. 725 Construction requirements.

(a) Licensees granted nationwide authorizations will be required to construct base stations in the markets designated in the application as follows:

(1) In at least 10% of the markets designated within two years of licensing, in at least 40% within four years, in at least 70% within six years, and in all designated markets within ten years of licensing.

(2) Licensees not meeting the two and four year criteria shall lose the entire authorization, but will be permitted a six month period to convert the system to non-nationwide channels, if such channels are available.

(3) Licensees not meeting the six and ten year criteria shall lose the authorizations for the facilities not constructed, but will retain exclusivity for its constructed facilities.

(4) Progress reports will be filed at the conclusion of each of the above periods to inform the Commission of the status of the system.

(b) Except as provided in § 90.709, licenses for nationwide systems may be assigned or transferred only after the licensee has constructed at least 40% of the proposed system. The assignee or transferee of a nationwide system is subject to the construction benchmarks and reporting requirements in paragraph (a). The assignee or transferee is not subject to the entry criteria described in § 90.713.

(c) Licensees authorized non-nationwide systems will be permitted twelve months to construct the system. Authorizations for systems not constructed within twelve months from the date of grant will cancel automatically.

§ 90. 727 Extended implementation schedules.

Except for nationwide and commercial systems, a period of up to three (3) years may be authorized for constructing and placing a system in operation if:

(a) The applicant submits justification for an extended implementation period. The justification must include reasons for requiring an extended construction period, the construction schedule (with milestones), and must show either that:

(1) The proposed system will serve a large fleet of mobile units and will involve a multi-year cycle for its planning, approval, funding, purchase, and construction; or

(2) The proposed system will require longer than twelve months to place in operation because of its purpose, size, or complexity; or

(3) The proposed system is to be part of a coordinated or integrated area-wide system which will require more than 12 months to construct; or

(4) The applicant is a local governmental agency and demonstrates that the government involved is required by law to follow a multi-year cycle for planning, approval, funding, and purchasing the proposed system.

(b) Authorizations under this section are conditioned upon the licensee's compliance with the submitted extended implementation schedule. Failure to meet the schedule will result in loss of authorizations for facilities not constructed.

§ 90. 729 Limitations on power and antenna height.

(a) The permissible effective radiated power (ERP) with respect to antenna heights shall be determined from the Table. These are maximum values and applicants are required to justify power levels requested.

Equivalent Power and Antenna Heights

Antenna height above average terrain (HAAT), meters	Effective radiated power, watts
Up to 90	200
90 to 120	100
120 to 150	75
150 to 200	50
200 to 275	25
Above 275	20

(b) The maximum permissible ERP for mobile units is 20 watts. Portable units are considered as mobile units.

§ 90. 731 Restrictions on operational - fixed stations.

(a) Except for control stations, operational-fixed stations will not be authorized in the 220-222 MHz band. Licensees may utilize their authorized frequencies for fixed signaling in accordance with § 90.235 of this part.

(b) Control stations associated with one or more mobile relay stations will be authorized only on the assigned frequency of the associated mobile station. Use of a mobile service frequency by a control station of a mobile relay system is subject to the condition that harmful interference shall not be caused to stations of licensees authorized to use the frequency for mobile service communications.

§ 90. 733 Permissible operations.

(a) Systems authorized in the 220-222 MHz band may be used:

(1) Only for base/mobile and mobile relay transmissions on a primary basis, and fixed voice and signaling transmissions on a secondary basis. Paging operations are not permitted in this band.

(2) Only by persons who are eligible for facilities under either this subpart or in the radio services included in Subparts B, C, D, or E.

(3) Only for the transmission of messages or signals permitted in the services in which the licensees are eligible.

(b) When two or more contiguous channels are authorized to a single licensee (up to a ten channel nationwide block), more than a single emission may be utilized within the authorized bandwidth. In such cases, the frequency stability requirements of § 90.213 shall not apply, but the out-of-band emission limits of § 90.209(l) shall be met.

§ 90. 735 Station identification.

(a) Except for nationwide and trunked systems authorized in the 220-222 MHz band, station identification is required pursuant to § 90.425.

(b) Systems authorized on nationwide frequencies pursuant to this subpart do not require station identification.

(c) Trunked systems shall employ an automatic device to transmit the call sign of the base station at 30 minute intervals. The identification shall be made on the lowest frequency in the base station trunked group assigned to the licensee. If this frequency is in use at the time identification is required, the identification may be made at the termination of the communication in progress on this frequency.

(d) Station identification may be by voice or International Morse Code. If the call sign is transmitted in International Morse Code, it must be at a rate of between 15 to 20 words per minute, and by means of tone modulation of the transmitter, with the tone frequency being between 800 and 1000 hertz.

§ 90. 737 Supplemental reports required of licensees.

(a) Licensees of nationwide systems must file progress reports pursuant to § 90.725(a)(4) of this subpart.

(b) Licensees offering service on a commercial basis must maintain records of the names and addresses of each customer and the dates that service commenced and terminated. These records must be made available to the Commission upon request. Such licensees must report at the time of license renewal the number of mobile units being served.

(c) Non-commercial trunked system licensees must report at the time of license renewal the number of mobile units being served.

(d) Except for licensees of nationwide systems, all licensees must report whether construction of the facility has been completed within 12 months of the date of grant of their license.

(e) All reports must be filed with the Land Mobile Branch, Licensing Division, Private Radio Bureau, Gettysburg, PA 17326.

§ 90. 739 Number of systems authorized in a geographical area.

There shall be no limit on the number of systems authorized to operate in any one given area except that imposed by frequency assignment limitations. No person shall have a right to protest any application or grant on grounds other than violation of any of the provisions of this subpart.

§ 90. 741 Special licensing requirements for commercial systems.

End users on commercial systems must be licensed for any associated control points, control stations, and mobile units and only licensed end users are authorized to use those systems.

§ 90. 743 Temporary permit.

An applicant for a license to utilize an already authorized facility may operate its station(s) for a period of up to 180 days under a temporary permit evidenced by a properly executed certification of FCC Form 572 after filing a formal application for station license, provided the antenna(s) employed by the control station(s) is(are) 6.1 meters or less above ground or 6.1 meters or less above a man-made structure other than an antenna tower to which it is affixed.

FOOTNOTES

[1] Report and Order, Gen. Docket No. 87-14, 3 FCC Rcd 5287 (1988), *recon. denied*, 4 FCC Rcd 6407 (1989), *appeal filed*, American Radio Relay League, Inc. v. FCC and United States of America, D.C. Cir. 89-1602 (Sept. 28, 1989) and United States of America v. FCC, D.C. Cir. 89-1635 (Oct.16, 1989). Adoption of a final Report and Order in the instant proceeding, however, will be contingent on the outcome of the pending appeal of the *Allocation Order*.

[2] The *Allocation Order* (*Id.* at paragraph 58) allows amateur stations to continue using the 220-222 MHz band while the service rules are being developed for the land mobile service. However, the Commission encouraged amateur operators to begin an orderly transition of on-going operations from the 220-222 MHz band to other amateur service frequency bands to avoid an abrupt termination when the land mobile service rules are completed. We continue to encourage such transitions as such amateur stations will be required, by a separate Order, to terminate operations in the 220-222 MHz band at the conclusion of this proceeding.

[3] *Id.* at paragraph 1.

[4] UPS Petition at 1-15.

[5] UPS Petition at 15, 21-24.

[6] *See* 47 C.F.R. Part 90, Subpart B (Public Safety Radio Service), Subpart C (Special Emergency Radio Service), Subpart D (Industrial Radio Service), and Subpart E (Land Transportation Radio Service).

[7] Four of the six 10-channel blocks would be available for nationwide operation; the other two blocks would be available for local use. Local blocks could be grouped in contiguous geographic areas to facilitate regional operations.

[8] UPS Petition at 15-17 and Petition Appendix B at 1-7.

[9] UPS Petition at 18 and Petition Appendix B at 6-7.

[10] UPS Petition at 20 and Petition Appendix B at 21-23.

[11] UPS Petition at 18, 24-25, 31, and Petition Appendix B at 7-13.

[12] UPS Petition Appendix C at 2.

[13] UPS Petition Appendix B at 14-15.

[14] UPS Petition Appendix B at 13-14.

[15] UPS Petition Appendix B at 16-21.

[16] These parties are The American Radio Relay League, Incorporated (ARRL), The American Trucking Association (ATA), the Association of American Railroads (AAR), Forest Industries Telecommunications (FIT), and SEA, Inc.(SEA).

[17] ARRL Comments at 3-4. This argument is now moot because we recently reaffirmed the *Allocation Order* and dismissed the Petitions for Reconsideration. *See* note 1, *supra*.

[18] ARRL Comments at 3-5.

[19] *Id.* at 10.

[20] ATA Comments at 2-4.

[21] *Id.* at 3.

[22] AAR Comments at 9; FIT Comments at 7.

[23] AAR and FIT further maintain that the UPS nationwide licensing scheme is, in any event, not spectrally efficient, since the proposed loading and construction requirements for nationwide licensees would not constitute intense use of the reserved channels. They also argue that the UPS suggested use of comparative criteria and financial qualifications for national applicants is inappropriate, since financially weak applicants may need land mobile services as much as financially strong applicants need them. AAR Comments at 5-8; FIT Comments at 4-8.

[24] AAR Comments at 6; FIT Comments at 5.

[25] AAR Comments at 8; FIT Comments at 8.

[26] SEA Comments at 8-9.

[27] *Id.* at 10-11.

[28] *Id.* at 9.

[29] Allocation Order at paragraph 17.

[30] As we indicated in the Allocation Order, a dedicated band of frequencies was needed to promote the development of narrowband technology for land mobile use. In the existing 150 MHz and 450 MHz land mobile bands, the growth and acceptance of narrowband systems has been severely limited by the unavailability of frequencies and by the technical and other restrictions necessary to protect existing land mobile operations from interference. Allocation Order at paragraphs 14 and 17.

[31] UPS Petition at 15-17 and Petition Appendix B at 1-2.

[32] *See* note 5 *supra*.

[33] FIT Comments at 7; AAR Comments at 9.

[34] This question is especially relevant in light of the fact that, regarding use of certain 800 MHz bands by public safety licensees, the Public Safety Radio Services opposed the creation of channels with a 12.5 kHz bandwidth rather than a 25 kHz bandwidth. *See* Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987) (concerning use of the 821-824/866-869 MHz bands by the Public Safety Radio Services).

[35] UPS Petition at 15-18 and Petition Appendix B at 1-6. Licensees of both nationwide and local blocks could also split the blocks into more or fewer than ten channels, provided that they met relevant loading requirements for the block.

[36] UPS Petition at 23, 28-34, and Petition Appendix B at 23.

[37] *See, e.g.*, First Report and Order, Gen. Docket No.79-188, 49 RR2d 509 (1981) (concerning nationwide Digital Termination Systems); Memorandum Opinion and Order, Gen. Docket No. 80-183, 93 FCC 2d 908 (1983) (concerning nationwide paging systems).

[38] *See* Tables in paragraphs 25, 26, and 31 *infra*.

[39] UPS Petition at 16 and Petition Appendix B at 2-3.

[40] We recognize that establishing wide-area, regional systems may in some cases be difficult, since the operator will have to obtain several license grants or negotiate with successful applicants to put together the system it needs. However, we believe that this task is less involved than establishing a nationwide system and, in most cases, can be sucessfully accomplished even if we do not establish a "local" set-aside.

[41] UPS states that data transmissions permit many more mobiles to share a radio channel than is possible using conventional analog transmission, avoid the need for repeated transmissions since messages can be stored in a mobile unit for subsequent retrieval by an operator who is away from the mobile when the message is first transmitted, and permit the transmission of graphic information and detailed instructions. According to UPS, at least ten times the number of voice

mobiles can be loaded onto a single channel pair using data technology. UPS Petition at 18, 23-24, and Petition Appendix B at 7.

[42] UPS Petition at 23-24.

[43] AAR Comments at 6; FIT Comments at 5.

[44] Data transmissions generally permit greater information transfer than voice transmission in a specific time period.

[45] As indicated in paragraph 17 *supra*, however, we believe nationwide licensees should have maximum flexibility in using the channel blocks allocated to them and therefore, contrary to the UPS suggestion, we do not propose that nationwide allocations be reserved for data operations.

[46] We have under consideration a new personal radio service to provide the general public with emergency communications/notification capability. *See* Petition for Rule Making filed by Kenneth J. Seymour, RM 6681 (received January 13, 1989). At this time, we have not finalized the frequencies to be designated for this service. One option is frequencies in the 220-222 MHz band. Therefore, we are tentatively reserving five frequency pairs (channel Nos. 196-200) pending further Commission action on this matter. If such a service is not implemented, or will use frequencies in a different band, these five channels will be returned for PLMRS use, as reflected in our band plans. Comments on our interim reservation of channels should be withheld until a formal Commission proposal is released concerning the establishment of a personal emergency locator and tracking service. Comments on whether five different channels should be so designated would, however, be appropriate.

[47] All individual channels will be reserved for non-commercial use only for a period of five years. *See* paragraph 14, *supra*.

[48] All individual channels will be reserved for non-commercial use only for a period of five years. *See* paragraph 14, *supra*.

[49] A block of five or ten contiguous channels gives a licensee, in effect, 25 or 50 kHz of bandwidth, respectively. This concept is the same as that applied when we channelized the 900 MHz spectrum. *See* Report and Order, Gen. Docket No. 84-1233, 2 FCC Rcd 1825 (1986). Licensees would not be permitted to group narrowband channels to create a wideband voice channel.

[50] As an example, fourteen frequencies in the 154 and 173 MHz bands are available solely for non-voice operation pursuant to §§ 90.238(b) and (c).

[51] Packet transmission is data that is sent in short bursts, called packets, which are retransmitted until received and acknowledged. It is a form of time division multiplexing (TDM) which is already used in other communications radio services because it is highly efficient, resistant to co-channel interference, and can accommodate many users on a single channel while giving each user what appears to be a dedicated channel.

[52] *See* paragraphs 15-20, *supra*.

[53] UPS proposes that if fewer than four qualified applicants apply for the nationwide channel blocks before the established cut-off, the unassigned channel blocks be available to qualified applicants on a first-come, first- served basis. UPS Petition Appendix B at 23.

[54] *See, e.g.*, Third Report and Order, 97 FCC 2d 900, 911 (1984) (concerning network paging applications); *see also*, Cellular Mobile Systems of Pennsylvania v. FCC, 782 F 2d 182 (D.C. Cir. 1985); Notice of Inquiry and Proposed Rule Making, CC Docket No. 80-116, 54 RR 2d 107 (1980) (concerning MDS applications).

[55] Notice of Inquiry and Proposed Rule Making, CC Docket No. 80-116, 54 RR 2d 107 (1980).

[56] Non-commercial nationwide applicants will be able to file for both a 5-channel and 10-channel block. The filing of one application in any category open to an applicant, either commercial or non-commercial, will make the applicant eligible to be licensed on any channel block in that category. However, no applicant will be initially licensed for more than one block.

[57] Using previously developed procedures, Government applications will be submitted to the NTIA and non-Government applications will be submitted to the Commission. The Commission and NTIA, through the Interdepartment Radio Advisory Committee (IRAC) Frequency Assignment Subcommittee, will grant as many applications as possible. Mutually exclusive Government and non-government applications filed on the same day will be subject to lottery proceedings to determine whether the relevant channel will be assigned to a Government or non-Government entity. Depending on whether the winner of this lottery is a Government or non-Government entity, the NTIA or the Commission respectively shall issue the authorization. If the lottery determines that a non-Government applicant will receive the allocation and there are mutually exclusive non-Government applications, then the Commission will conduct a second lottery to select from among those applicants. This procedure is generally that adopted in the Second Report and Order, Gen. Docket No. 82-243, 4 FCC Rcd 2012 (1989), concerning Government/non-Government sharing of the 932-935 MHz and 941-944 MHz bands.

[58] Given the sharing of this spectrum with the Federal Government and the exclusivity assigned to each licensee (*see* paragraph 50 *infra*), we propose that the Commission initially coordinate all non-Government assignments. We may at a later date, however, utilize the services of certified frequency coordinators to assist in the application process.

[59] UPS Petition Appendix B at 22.

[60] For nationwide licensees we are proposing an initial term of license of ten years and a strict construction schedule that requires the licensee to build a certain percentage of his proposed system by specified benchmark dates. *See* paragraphs 45-49, *infra*.

[61] We also propose to require the applicant to file an application fee for each base station specified in the ten-year construction schedule. Thus each applicant will file a minimum fee of $2,100.00 ($30.00 multiplied by a minimum of 70 base stations) with his initial application. 47 C.F.R. § 1.1102.

[62] We propose to require that the applicant or an officer of the applicant's organization attest to the validity of the unaudited balance sheet.

[63] We propose to permit the commitment to be contingent on the applicant's winning the relevant lottery proceeding.

[64] As stated in CC Docket No. 85-388, it is not possible to establish an exhaustive list of acceptable financing alternatives, since there are many legitimate sources of financing apart from equipment vendors, banks, and thrifts. We will consider financing arrangements between applicants and "non-conventional" sources, but will require that such sources demonstrate that they have the funds available to cover the total commitments they have made. *See generally*, CC Docket No. 85-388, 4 FCC Rcd 2542, 2547 (1988), *recon. denied*, 4 FCC Rcd 4464 (1989).

[65] 47 C.F.R. § 90.149.

[66] The Commission is authorized to grant up to a ten-year license in the private land mobile services pursuant to 47 U.S.C. 307(c).

[67] This proposal is consistent with our licensing plan for 900 MHz frequencies. *See* Report and Order, Gen. Docket No. 84-1233, 2 FCC Rcd at paragraph 79.

[68] UPS bases exclusive channel assignments on a seventy mile co-channel re-use standard. UPS Petition Appendix B at 14.

[69] UPS would have the nationwide licensee retain use of the affected channel outside a seventy mile radius of his base station. Also, after the licensee has given back three or more channels in a given location, we would give him the opportunity to show cause why he should not have to give back any more. UPS Petition Appendix B at 13.

[70] For non-nationwide licensees, we propose to continue our prohibition against transfer of unbuilt facilities. A nationwide licensee's ability to transfer or assign his license is tied to his benchmark performance levels. *See* note 72, *infra*.

[71] Thus the licensee must construct in a minimum of seven markets within two years of licensing, a minimum of twenty-eight markets within four years of licensing, and a minimum of forty-nine markets within six years of licensing.

[72] We propose to permit nationwide licensees to transfer or assign nationwide licenses any time after the licensee has constructed at least 40% of his proposed system; prior to that time we believe the transfer would be tantamount to transfer of a bare license and should be prohibited to discourage speculation. We further propose that, in all cases of assignment or transfer of nationwide licenses, the assignee "steps into the shoes" of the assignor and therefore must meet relevant construction benchmarks. We propose not to require nationwide assignees to meet specified financial or technical qualifications.

[73] If an applicant commits to build more than the minimum number of base stations, then the percentage figures apply to the applicant's proposed base stations, not to the seventy station minimum. Licensees will be permitted to adjust the location of their stations provided the number of stations and areas meet the established requirements.

[74] We have proposed similar construction benchmarks for nationwide licensees in a Notice of Proposed Rule Making concerning the 896-901/935-940 (900) MHz bands. In that Notice, however, we propose a more stringent cancellation policy. Specifically, we propose that if the nationwide licensee fails to meet any of the proposed construction benchmarks, its total authorization for use of the assigned nationwide frequencies will cancel. *See* Notice of Proposed Rule Making, PR Docket No. 89-553, FCC 89-328, adopted November 28, 1989. We seek comment on whether we should adopt the same policy in this proceeding.

[75] We will require that applicants for authorization of additional channels for system expansion justify each request on the basis of relevant information; *e.g.*, loading, separation of function, bit rate. We will examine requests on a case-by-case basis.

[76] Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988).

[77] A channel pair consists of a transmit and a receive frequency separated by an amount sufficient to permit duplex operation and minimize both interference potential and equipment cost. For example, at 450 MHz, paired transmit and receive frequencies are separated by 5 MHz, and above 800 MHz, by either 39 or 45 MHz.

[78] UPS Petition Appendix B at 34.

[79] UPS has proposed the use of closer spacing between adjacent sub-bands in urban areas. UPS Petition Appendix B at 5. We are not proposing the closer spacing at this time, but we invite comments about the feasibility of closer geographic spacing in urban areas and the appropriate distances for various power levels and frequency separations.

[80] Transmitter peak envelope power (PEP) must be used to determine effective radiated power.

[81] For high antenna heights, an ERP of twenty watts for the base station provides reciprocity with the limited power used by mobile transmitters.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Notice of Proposed Rule Making Amending Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services.

I am releasing this statement solely to draw attention to the issue of loading requirements. The Notice places emphasis on the proposal to have no loading requirements. The rationale for the "no loading requirement" proposal is based on the assumption that the marketplace will assure that spectrum is used and used efficiently.

In the past, where similar marketplace conditions were functioning, the Commission imposed loading requirements to assure that spectrum was not warehoused or used inefficiently. (*See*, Second Report and Order, Docket 18262, 46 FCC 2d 752 (1974); Second Report and Order, Docket 79-191, 90 FCC 2d 1281 (1982); Memorandum Opinion and Order, Docket 79-191, 95 FCC 2d 477 (1983); Report and Order, Docket 86-404, 3 FCC Rcd No.7 1838(1988)).

Loading requirements proved very useful as demonstrated by the successful channel recovery program where over 2000 channels were recovered in the 800 MHz band. I am concerned that if left unchecked, relying solely on the marketplace will result in inefficient use of spectrum. Therefore, I am interested in having commenters address the need for loading requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GOLDEN CIRCLE BROADCASTING, INC. (Assignor) File No. BALCT-890222KH

and

JACKSON INVESTMENT CORPORATION (Assignee)

For Assignment of License of Station WJWT(TV) Jackson, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1989; Released: December 8, 1989

By the Commission: Commissioner Marshall not participating.

1. The Commission has before it for consideration the above-captioned application for consent to assignment of license of station WJWT(TV), channel 16 (IND), Jackson, Tennessee, from Golden Circle Broadcasting, Inc. (Golden Circle) to Jackson Investment Corporation (JIC). The acquisition of WJWT(TV) by JIC will result in the overlap of the predicted Grade B contour of that station with the predicted Grade B contour of commonly owned station WMKW-TV, channel 30 (IND), Memphis, Tennessee, in a manner inconsistent with Section 73.3555(a)(3) of the Commission's Rules, which generally proscribes common ownership of two television stations whose Grade B contours overlap. However, JIC proposes to operate WJWT(TV) "primarily as a satellite" of WMKW-TV, and requests that the assignment be granted pursuant to the exception for satellite operations set forth in Note 5 to the Commission's multiple ownership rule, Section 73.3555.[1]

2. JIC contends that the extent of the overlap between WJWT(TV) and WMKW-TV is not substantial, and that the overlap is located in sparsely populated areas of the market. In support thereof, the applicant submitted a Grade B overlap study which indicates that the Grade B contour of WJWT(TV) encompasses 3,952 square miles and a population of 238,976, and that the Grade B contour of WMKW-TV encompasses 6,152 square miles and a population of 1,051,237. The overlap area would encompass 273 square miles and 7,693 persons, representing 4.4% of WMKW-TV's Grade B contour (0.73% of the population) and 6.9% of WJWT(TV)'s Grade B contour (3.2% of the population). JIC argues that in the past the Commission has granted satellite operation in cases where the overlap has been more substantial.

3. Further, JIC states that, although the Jackson economy is stable, the market is too small to support a stand-alone UHF station. In that connection it states that Jackson is currently ranked by Arbitron as the 180th largest television market, with 62,400 households and 163,900 persons. Jackson has a population of 49,131; and Madison County, in which Jackson is located, has a population of 74,546. Because of the expense involved, JIC maintains that it did not commission an economic analysis of the community, and it contends that such an economic showing is unnecessary where the economic justification can be inferred from the market size and financial condition of the station. *See McAlister Television Enterprises, Inc.*, 60 RR2d 1379, 1384 (1986); and *Capitol Broadcasting Co.*, 54 RR2d 811, 814, n. 9 (1983). In addition to WJWT(TV), JIC states that the Jackson market is served by station WBBJ-TV, channel 7 (ABC), Jackson, Tennessee, and noncommercial station WLJT-TV, channel 11, Lexington, Tennessee. We note that the overlap area also receives off-the-air Grade B service from five stations (WMC-TV, channel 5 (NBC); WPTY-TV, channel 24 (IND); WHBQ-TV, channel 13 (ABC); WREG-TV, channel 3 (CBS); and noncommercial station WKNO-TV), all licensed to Memphis, Tennessee. Further, JIC notes that cable penetration in Jackson exceeds 58%. It also contends that its programming performance, as noted by its ratings and shares in the market, demonstrates that WJWT(TV) cannot effectively compete with cable television and the local VHF ABC affiliate. In this regard, JIC states that according to A.C. Nielsen's ratings and shares, WJWT(TV) exceeded a rating average of one percent only once during the last two years (a percent of the total television households in the market), and that its share of households using television is usually in the two to three percent range (percent of television households in the market that are actually watching programming during the particular time period). JIC argues that such rating performance in a small market is insufficient to support an independent stand-alone operation.

4. JIC also claims that the financial condition of the station is very poor, and that the station's losses have placed a drain on the present licensee. Since commencing operation in April, 1984, JIC states that WJWT(TV) has lost over $2,000,000, and it notes the following losses for the fiscal years ending August 31, 1985 through August 31, 1988:[2]

Year	Net Loss
1985	$393,819
1986	817,320
1987	544,187
1988	278,048

Additionally, JIC maintains that the station is in danger of defaulting on its current and long-term liabilities. In this regard, it points out that during the above fiscal years, the station's liabilities exceeded its assets, as follows:

Year	Current Assets	Total Assets	Current Liabilities	Total Liabilities
1985	$170,166	$1,442,339	$1,633,705	$1,820,542
1986	175,608	1,389,264	2,528,805	2,584,787
1987	231,675	1,300,694	2,112,788	1,729,653
1988	370,841	1,521,696	1,624,063	1,729,653

Moreover, it argues that the above data supports its contention that unless the station is able to dramatically increase sales or decrease costs, it will not be able to continue operations without the infusion of additional capital.

5. The infusion of additional capital is unlikely. JIC maintains, in view of the present financial condition of WJWT(TV). JIC submitted letters from Golden Circle and First American Bank that claim that prompt action on the instant application is necessary because of the severe financial condition of the station. In a letter, dated September 8, 1989, Golden Circle states that since filing the subject application, the station's assets have been the subject of a foreclosure proceeding by First American Bank, and that the station's present operation is dependent upon an interim arrangement with the bank. First American Bank notes in its letter of September 5, 1989, that since mid-1988, it has been funding the station's payrolls, payroll taxes, utilities, and programming costs. It further asserts that it has satisfied existing liens to the Internal Revenue Service and has taken other actions in order to keep the station on the air. Moreover, it maintains that since December, 1987, it has received no payments of interest from Golden Circle on the station's outstanding indebtedness. Under these circumstances, First American states that it has had to foreclose on various assets of the station. Even though it has undertaken the foregoing, it asserts that it still has had to make additional advances to the station in order to keep it operational. Thus, First American Bank concludes that unless the subject transaction is approved soon, it will not be able to continue its funding of the station, and WJWT(TV) will have to cease operation.

6. Concerning the station's programming, JIC states that the station currently broadcasts thirty minutes of local programming weekly. JIC proposes to maintain the WJWT(TV) studio in Jackson and to continue the station's current local programming.[3]

DISCUSSION

7. Traditionally, satellite operations have been authorized as a means of providing television to small communities which are unable to support full-service operations and which might not otherwise receive service. One means of carrying out the goal of bringing service to these communities is reflected in Note 5 to Section 73.3555(a)(3) of the Rules which relaxes our multiple ownership rules for a station operating as a satellite or "primarily" as a satellite. When satellites were first considered, they were authorized only in communities having no local off-the-air television station. *Multiple Ownership Rules*, 45 FCC 1728, 1735 (1964). That standard has evolved over the years in order to provide the public in smaller markets like Jackson with a choice of programs. Thus, even where a full-service station already serves an area, we have authorized competing satellite operations so long as the applicant has undertaken to establish or maintain a local studio and provide some local programming, and has shown other public interest factors sufficient to justify satellite operation. *See e.g., Midcontinent Broadcasting Co. of Wisconsin*, 12 FCC2d 111 (1968); *Meyer Broadcasting Co.*, 67 FCC2d 593 (1978); *aff'd sub nom., Dickinson Broadcasting Corp. v. FCC*, 593 F.2d 1371 (D.C. Cir. 1979). Additionally, the economic justification for a satellite operation may be inferred from the small size of the market or from the small size of the community of license at the fringe of a larger market. *Capitol Broadcasting Co.*, 54 RR2d at 814, n. 9 (1983); and *Pete J. Stathakas*, 59 RR2d 169 (1985), *recon. denied*, 60 RR2d 1293 (1986).

8. We believe that a sufficient showing has been made to justify authorization of a satellite operation in the Jackson market. The overlap to be created is not substantial, amounting to only 0.7% of WMKW-TV's population and 3.2% of WJWT(TV)'s population, and is consistent with Commission precedent. JIC has submitted information which appears to support its contention that Jackson will not support a stand-alone UHF station. It has demonstrated that, although WJWT(TV) carries a limited amount of Fox programming, it has been unable to compete with the local VHF ABC affiliate, WBBJ-TV, and that over the past four years the station has lost more than $2,000,000. It also appears that WJWT(TV)'s financial condition continues to decline. The First American Bank, which is funding the station's operation (i.e., payroll, payroll taxes, utilities, and programming), has already foreclosed on various assets of the station. JIC maintains that, without the continuation of such funding, which appears unlikely in view of the First American Bank's statement, WJWT(TV) would be unable to remain on the air, and is now in danger of defaulting on all of its outstanding liabilities. JIC has committed itself to maintaining the WJWT(TV) studio in Jackson and the station's current local programming. Grant of the instant proposal would thus ensure continuation of an independent television operation in Jackson.

9. For the reasons stated, we believe that operation of WJWT(TV) "primarily as a satellite" of WMKW-TV would serve the public interest. We find that the parties are fully qualified and that a grant of the application will serve the public interest, convenience and necessity.

10. Accordingly, IT IS ORDERED, That the application for consent to the assignment of the license for station WJWT(TV), Jackson, Tennessee, from Golden Circle Broadcasting, Inc. to Jackson Investment Corporation, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A 100-percent satellite station retransmits all of the programming of its parent, while a station categorized as "primarily a satellite" airs most of its parent's programs but produces less than five percent of its programming locally. *See, e.g., Amauro Group, Inc.*, 68 FCC2d 899 (1978).

[2] JIC states that the financial statements for 1987 and 1988 were not audited because it was unable to pay its accountants.

[3] It should also be noted that while WJWT(TV) and WMKW-TV are independent stations, they each broadcast programs supplied by the Fox Television Broadcast Group.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 7, 1989

COMMENTS INVITED ON PHILADELPHIA METROPOLITAN AREA REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Philadelphia Metropolitan Area (Region 28).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 28 consists of the following counties: Ocean, Burlington, Camden, Gloucester, Salem, Cumberland, Atlantic and Cape May counties, New Jersey; Bucks, Chester, Montgomery, Philadelphia, Berks, Delaware, Lehigh, Northampton, Bradford, Carbon, Columbia, Dauphin, Lackawanna, Lancaster, Lebanon, Luzerne, Lycoming, Monroe, Montour, Northumberland, Pike, Schuylkill, Sullivan, Susquehanna, Tioga, Wayne, Wyoming and York counties, Pennsylvania and the State of Delaware. General Docket No. 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to *General Docket 89-573, Philadelphia Metropolitan Area-Region 28*, and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497 or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-89-153

Application for authority under Section 214 of the Communications Act of 1934, as amended, to acquire and activate capacity in high capacity digital submarine cable systems between the United Kingdom and the Netherlands, and between the United Kingdom and the Federal Republic of Germany.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 7, 1989; Released: December 15, 1989

By the Chief, International Facilities Division:

1. On August 16, 1989, the American Telephone and Telegraph Company (AT&T) filed an application seeking authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214 (1988), to acquire capacity in the high capacity digital submarine U.K-Netherlands No. 12 Cable System (U.K.-Netherlands 12) and the high capacity digital submarine U.K-Germany No. 5 Cable System (U.K.-Germany 5), to acquire by lease such connecting facilities as may be needed to extend the capacity acquired in the two cables to certain specified countries, and, as required, to activate and operate capacity for AT&T's authorized services to points in or reached via the specified countries. The application, placed on Public Notice August 23, 1989, was unopposed.

2. U.K.-Netherlands 12, which went into service in September 1989, extends from Aldeburgh, United Kingdom to Domburg, the Netherlands. It operates at a bit rate of 140 megabits/second on a single mode unrepeatered optical fiber at a wavelength of 1.55 microns. Its capacity is provided on six fiber pairs, each containing 64 2-Mbit/s minimum units of assignment (MUAs).[1]

3. U.K-Netherlands 12 is divided into four segments. Segments 1 through 3 are, respectively, the cable stations in Aldeburgh, United Kingdom (British Telecommunications PLC, or BT), Aldeburgh, United Kingdom (Mercury Communications Limited, or MCL) and Domburg, the Netherlands (PTT Telecom BV, or PTT). To accommodate the shared ownership of U.K.-Netherlands 12 in the U.K., there is a land-based branching unit, located 200 kilometers inland from the U.K. beach joint, to provide access to the separate BT and MCL terminals. Segment 4 consists of the submarine cable system between and including the nominal 140 megabits/second distribution points at both the BT and MCL terminals at Aldeburgh, United Kingdom and the distribution points at Domburg, the Netherlands. Segment 4 has three subsegments. Subsegment 4(i) is the cable system between and including the land-based branching unit in the U.K. and the distribution points at the PTT cable system. It contains six working fiber pairs, three of which are connected at the land-based branching unit in the U.K. to subsegment 4(ii) and three of which are connected at the land-based branching unit to subsegment 4 (iii). Subsegment 4(ii) is that portion of the system between the land-based branching unit in the U.K. and the distribution points at the BT cable station. It contains three fiber pairs in which capacity is assigned and three fiber pairs that are available for use between the BT and MCL terminals. Subsegment 4(iii) is that part of the cable system between the land-based branching unit and the distribution points at the MCL cable station. It also contains three fiber pairs in which capacity is assigned and three fiber pairs that are available for use between the MCL and BT terminals.

4. U.K.-Germany 5, which is scheduled for service in mid-1991, will extend from Winterton, United Kingdom to Norden, Federal Republic of Germany. It will operate at a bit rate of 1.8 gigabits/second on a dispersion-shifted single mode fiber that carries traffic in the form of a luminar signal emitted by a 1.55 micron laser diode. Its capacity will be provided on one or two fiber pairs, each pair providing twelve 140 Mbit/s streams, with each stream containing 64 2.048-Mbit/s minimum investment units (MIUs).[2]

5. U.K.-Germany 5 will be divided into four segments. Segment 1A is the BT cable station at Winterton, U.K. Segment 1B is the MCL cable station at Winterton. Segment 2 is the submarine cable between the beach joints at Winterton and Norden, Federal Republic of Germany. Segment 3 is the cable station at Norden.

6. The two cable systems will be connected in the U.K., the Netherlands and the Federal Republic of Germany with the respective domestic networks of those countries. They also will be extended by suitable facilities to the borders of other countries participating in the systems or to the terminals of other international communications systems, including other cable terminals and satellite earth stations. U.K.-Netherlands 12 and U.K.-Germany 5, when connected with the TAT-8 and TAT-9 common carrier transatlantic cables, can be used for services between the United States and beyond, on the west, and the Netherlands and Federal Republic of Germany and beyond, on the east. AT&T currently serves these points via satellite circuits acquired from Comsat and existing submarine cable facilities.

7. AT&T will use the capacity in U.K.-Netherlands 12 and U.K-Germany 5 to provide its authorized services to points in or reached via the Netherlands, Denmark, Finland, the Federal Republic of Germany, Norway and Sweden. AT&T advises that there will be sufficient capacity in these cables in the initial years of service to accommodate the capacity needs of other U.S. carriers and countries that are not co-owners but have or will have a need to use the facilities.[3] The Construction and Maintenance Agreement (C&MA) for each cable system contains a provision permitting the assignment of capacity in each system between its co-owners and others.[4]

8. AT&T advises that the estimated capital cost of U.K.-Netherlands 12 is $11 million, of which AT&T will bear approximately $120,000 for the purchase of 7 half-

MUAs in Segment 4 and certain central office equipment. The co-owners of U.K-Netherlands 12 have selected STC of the U.K. as the supplier of the cable system. The estimated capital cost of U.K.-Germany 5 will be $31 million, of which AT&T will bear approximately $1.92 million for the purchase of 95 half-MIUs in Segment 2 and certain central office equipment. The co-owners of U.K.-Germany 5 have selected FUJITSU of Japan as the supplier of the cable system. The respective C&MAs for the two cable systems provide that Transpacific Communications, Inc., a wholly-owned U.S.-subsidiary of AT&T, will own and be responsible for AT&T's shares of the capital, operational and maintenance costs of the cable systems.

9. We conclude that grant of AT&T's application to acquire and operate capacity in the U.K.-Netherlands 12 and U.K.-Germany 5 cable systems will be in the public interest. The Commission and Common Carrier Bureau orders authorizing, respectively, the TAT-8 and TAT-9 digital common carrier cables[5] contemplated that the U.S. international service carriers that were co-owners in those facilities would obtain and operate necessary connecting facilities between the European terminals of TAT-8 and TAT-9 and the borders of the countries of the European co-owners of the TAT-8 and TAT-9 cable systems. The orders specifically authorized the U.S. carriers to lease or acquire by indefeasible right of use (IRU) such necessary connecting facilities.[6] In the instant application, AT&T seeks authority to purchase ownership interests in the U.K.-Netherlands 12 and U.K-Germany 5 cable systems to provide for digital interconnectivity with TAT-8 and TAT-9. As the Commission observed in its recent order authorizing the implementation of the TPC-4 cable system in the Pacific,[7] the price cap system of regulation currently applicable to AT&T limits the incentives that the carrier might have to engage in unnecessary investment. Thus, AT&T must assess carefully the need for and cost of any new facility investment, or, as in the instant case, whether to purchase, as oppose to lease or acquire IRU in, circuits necessary to provide its authorized services to foreign points.[8] Moreover, interconnection of the previously-authorized optical fiber submarine cable systems, TAT-8 and TAT-9, with the U.K.-Netherlands 12 and U.K.-Germany 5 digital cable systems will extend lightwave technology to additional points in Europe and beyond, permitting interconnection with a rapidly-developing global common carrier digital network. As the Bureau previously has observed,[9] such extension of technology serves to promote intermodal and intramodal competition, technological development and customer choice. This in turn creates incentives for more efficient operations and provides service quality benefits in terms of path and media diversity and restoration capabilities. We find that these observations are equally applicable here.

10. Accordingly, IT IS ORDERED that AT&T's application, File No. I-T-C-89-153, IS GRANTED and AT&T is authorized to:

a. acquire and operate with Netherlands PTT Telecom BV one-half interest in seven MUAs in the U.K.-Netherlands 12 cable system;

b. acquire and operate in the U.K.-Germany 5 cable system one-half interest in three MIUs with Telecom Denmark, in one MIU with General Directorate of Posts and Telecommunications of Finland, in 80 MIUs with the Deutsche Bundespost, in two MIUs with the Norwegian Telecommunications Administration, and in nine MIUs with the Swedish Telecommunications Administration; and

c. acquire by lease such connecting facilities as may be needed to extend the capacity to be acquired in the U.K.-Netherlands 12 cable system to the Netherlands and in the U.K.-Germany 5 cable system to Denmark, Finland, Federal Republic of Germany, Norway and Sweden.

11. IT IS FURTHER ORDERED, that the Commission retains the jurisdiction to review the DCMS, multiplexing and interworking arrangements and attribution of costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

12. IT IS FURTHER ORDERED, that AT&T shall not dispose of any authorized interest or capacity in the U.K.-Netherlands 12 or U.K.-Germany 5 cable system without prior authorization by the Commission.

13. IT IS FURTHER ORDERED, that AT&T shall include the U.K.-Netherlands 12 and U.K.-Germany 5 cable systems in its monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

14. This order is issued under Section 0.291 of the Commission's Rules and Regulations, 47 C.F.R. Section 0.291 (1988), and is effective on release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Assignment of capacity in U.K.-Netherlands 12 is based on MUAs equivalent to a 2.048 Mbit/s stream.

[2] Assignment of capacity in U.K.-Germany 5 is based on MIUs equivalent to a 2.048 Mbit/s stream.

[3] Two U.S. common carriers, AT&T and US Sprint, are parties to the U.K.-Netherlands 12 construction and maintenance agreement (C&MA). Five U.S. common carriers currently are parties to the U.K.-Germany 5 C&MA.

[4] *See* AT&T's application, at Attachment B, clause 14 and Attachment E, clause 6. Clause 27 of the U.K.-Germany 5 C&MA also provides for admission of additional parties until the cable's ready-for-service date. *See* Attachment E, clause 27.

[5] TAT-8 214 Order, 98 FCC 2d 440 (1984); TAT-9 214 Order, 4 FCC Rcd 1129 (Com. Car. Bur. 1988).

[6] 98 FCC 2d at 471, 4 FCC Rcd at 1133.

[7] TPC-4 214 Order, FCC 89-306 (released November 15, 1989).

[8] The half-circuit (64 Kbps) capital cost for the purchased capacity in each of these cable systems approximates $600-700.

[9] H-J-K 214 Order, 3 FCC Rcd 3605 (Com. Car. Bur. 1988).

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